No. 10-

Supreme Court, U.S.
FILED

10-462 OCT 5 - 2010

IN THE

OFFICE OF THE CLERK

Supreme Court of the United States

MUNICIPALITY OF AGUADA, PUERTO RICO

Petitioner

v.

MARITZA ACEVEDO-ORAMA; YARITZA ACEVEDO-ORAMA; ELIZABETH ACEVEDO-ORAMA; MIGDALIA ACEVEDO-ORAMA; CARLOS CONCEPCIÓN CHAPARRO; JOSÉ A. MÉNDEZ-VALLE, ANGEL CASTRO-GONZÁLEZ; MIGUEL A. CORTÉS-ROMÁN; WILLIAM ROSA-FIGUEROA; MIGUEL TORRES-PÉREZ; EDWIN ACEVEDO-ACEVEDO; RAÚL PANETO-COLÓN; MARIA PANETO-COLÓN; GILBERTO VARGAS-RÍOS; AMILCAR MUÑIZ-ROSADO; ADELAIDA ROSARIO-GALLOZA; ÁNGEL L. JIMÉNEZ-ACEVEDO; EDWIN VILLARRUBIA-SOTO; JOSÉ VILLANUEVA-RODRÍGUEZ; JOSÉ A. CUEVAS-HERNÁNDEZ; ELBA I. QUINTANA-ROMÁN; RAMONITA ACEVEDO-MUÑOZ; PABLO VILLANUEVA-RUIZ; THUAILA MUÑIZ-SANTONI; GLORIVEE SUÁREZ; RAMONITA RODRÍGUEZ-VARELA; ANÍBAL MÉNDEZ-ACEVEDO

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the First Circuit Court of Appeals improperly denied Petitioner's request for certification to the Puerto Rico Supreme Court of an issue of first impression and of great public policy implications under Puerto Rico law, in a decision which granted a proprietary interest to state employees not granted by state law: specifically whether municipal entities are obligated to finance temporary Law 52 appointments with municipal funds after the allocated funding has expired upon operation of law, and whether the mere expectation of a proprietary interest is enough to grant such right.

Whether the mere expectation of a proprietary interest is enough to uphold a due process violation under the Fourteenth Amendment, once the funding under Law 52 for the municipal employees' temporary appointments ceased; and the previous administration that appointed the temporary employees failed to follow the strictures of governmental contracting set forth in state law.

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The Municipality of Aguada respectfully petitions for a writ of *certiorari* to review the judgment of the U.S. Court of Appeals for the First Circuit.

OPINIONS AND ORDERS BELOW

The decision of the U.S. Court of Appeals for the First Circuit is reported at 607 F.3d 231 and is reproduced in the Petitioner's Appendix A. The decision of the U.S. District Court for the District of Puerto Rico is reported at 524 F. Supp. 2d 150 and is reproduced in the Petitioner's Appendix B. The instant case had previously been remanded to the District Court by the First Circuit and said decision is reported at 447 F.3d 115, and is reproduced in Petitioner's Appendix C. Both prior decisions by the District Court were reported at 275 F. Supp. 2d 162, and 296 F. Supp. 2d 142, respectively, and are reproduced in the Petitioner's Appendix D and E.

JURISDICTION

The judgment of the court of appeals was issued on June 3, 2010. Petitioner's timely petition for rehearing and rehearing *en banc* was denied on July 7, 2010. Petitioner's Appendix F. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment of the United States Constitution provides:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United

> States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

29 P.R. Laws Ann. § 711c (2006), provides in the pertinent part:

> § 711c. Employment Opportunities Development Fund
>
> (a) Establishment of the Fund. An Employment Opportunities Development Fund is hereby created in the Department of the Treasury of the Commonwealth of Puerto Rico, as a special fund, separate and distinct from all other moneys or funds of the Commonwealth of Puerto Rico.

21 P.R. Laws Ann. § 4366, provides in pertinent part:

> § 4366. On contracts
>
> Every contract executed in contravention of the provisions of this section shall be null and ineffective. If public funds have been invested, said amount may be recovered in behalf of the municipality through the proper action filed to such purpose.

21 P.R. Law Ann. § 4564 (2006) states:

§ 4564. Limitations of personnel transactions during election periods

In order to ensure the faithful application of the merit principle in the municipal public service at all times, the nominating authorities shall abstain from carrying out any personnel transaction that involves the areas essential to the merit principle, such as appointments, promotions, transfers, demotions, reclassifications, changes in salaries and categories of positions and employees, within a term that is comprised of the two (2) months prior to the date the general election is held, and until the second Monday in January following said election.

After due approval by the Central Personnel Administration Office, exception may be made regarding those personnel transactions deemed necessary to fulfill the needs of the service.

In those necessary cases, it shall be the responsibility of each nominating authority to request that said personnel action be excepted from the prohibition. The request must indicate the adverse effects to be prevented through the exception. Appointments that do not comply with this procedure shall be deemed null.

STATEMENT

In the current case, Respondents are twenty-two former temporary employees of the Petitioner Municipality of Aguada, Puerto Rico, who were hired pursuant to a letter of appointment stating that the term of employment was effective through June 30, 2001, but also stating that the employment was "by way" of an employment grant awarded by the Puerto Rico Department of Labor and Human Resources ("PRDLHR") under the statutory scheme created by Public Law Number 52 of August 9, 1991, as amended, 29 P.R. Laws Ann. § 711(c) ("Law 52"), that the Municipality of Aguada had received from the Commonwealth of Puerto Rico. This law creates a special fund to "be used in the creation of an employment and training opportunities program in the public and private sectors as provided by the Secretary through regulations." 29 P.R. Laws Ann. § 711 (c).

Because it was an election year, funding under that grant was exhausted after six (6) months, on December 31, 2000, instead of the usual twelve (12) months. The Municipality of Aguada, under a new Mayor, continued Respondents' employment through the month of January, 2001, paying their salaries out of municipal funds, but terminated Respondents' contracts one month later on the basis of lack of Law 52 funding. According to Respondents, they were entitled to some unspecified due process before the cessation of their duties and were entitled to continued employment until June 30, 2001, regardless of the fact that the Law 52 funds that fueled Respondents' employment expired on December 31, 2000. *See, id.*

Petitioner expressly argued that because the Law 52 funds had been depleted by December 31, 2000, by January 1, 2001 – although the Respondents continued to work at the municipality – there were no positions under Law 52 corresponding to their appointment/ contract. The absence of those positions in the municipal budget could only lead to one conclusion: these temporary employees had been appointed to the Law 52 positions created by virtue of the contract with the PRDLHR and their appointment ended on December 31, 2000, when the Law 52 funding expired. In this situation, Plaintiffs had no property right to the expired position and, therefore, no process would have been due. Further, Petitioner argued that there is a distinct difference between having *the means* to extend the duration of Plaintiffs' appointments with municipal funds and having *an obligation* to do so, as the existence *vel non* of a property interest was/is contingent upon the existence of an obligation to continue paying Respondents' salaries rather than a mere possibility to allot funds for such purposes.

This case has an extensive procedural history dating back to 2001, including several appeals: i) USCA No. 02-2287 (dismissed for lack of appellate jurisdiction regarding a third party complaint); ii) USCA No. 04-1154 after a Jury verdict dismissing all remaining claims against defendants, except the negligence claim against the Municipality, which was later dismissed by the court after being prompted by means of a *Judgment as a Matter of Law* presented by the Municipality; and iii) USCA No. 08-1989, after remand on the due process claims only.

Pursuant to Fed. R. Civ. P. 50(a), on June 16, 2003 the District Court had dismissed all due process claims against all Defendants. *See also Acevedo-Feliciano v. Ruiz-Hernández*, 275 F.Supp.2d 162, (Pet. App. E). The claims of political discrimination and negligence were submitted to the Jury. On July 18, 2003, the Jury returned a verdict against the Municipality of Aguada for negligence only. The Jury did not find that Defendants discriminated against Respondents due to political motives. On July 23, 2003, *Judgments* were issued.

On August 12, 2003, the Municipality of Aguada requested that the District Court enter *Judgment as a Matter of Law* in its favor. On December 22, 2003, the court entered an Opinion and Order and Judgment in favor of the Municipality of Aguada under Rule 50(b). *See also Acevedo-Feliciano v. Ruiz-Hernández*, 296 F.Supp.2d 142, (Pet. App. D). Notice of Appeal by Respondents followed.

On May 12, 2006, the Court of Appeals for the First Circuit affirmed the District Court's ruling denying Respondents' request for mistrial due to trial delay, but vacated and remanded the due process claims the District Court had dismissed pursuant to Rule 50(a). These were the only two issues before the appellate court in Case No. 04-1154. *See Acevedo-Feliciano v. Ruiz-Hernández*, 447 F.3d 115, (Pet. App. C). Therefore, the other issues became final and unappealable, including the dismissal of the political discrimination claims.

In its 2006 ruling, the First Circuit did not expressly find for Respondents, but rather determined that the lower court's rationale was not dispositive or supported, for which more analysis was needed, *and that Puerto Rican law on the subject was unclear. See Acevedo-Feliciano et al. v. Ruiz-Hernández, et al.*, 447 F.3d 115, 122-124, (Pet. App. C). This remand did not foreclose the same resolution to the case, once the District Court addressed "whether Puerto Rican law supplies any sort of property interest." *Id.* at 124 (Pet. App. C).

After the First Circuit's remand, and in light of this finding by the Court of a lack of clarity as to the applicable Puerto Rican law, all Defendants, including Petitioner, requested that the District Court certify the following questions to the Puerto Rico Supreme Court (hereinafter "PRSC"): (i) whether a one-year transitory appointment made under Law 52 creates an expectancy of continued appointment during said period, even if at the time of the appointment only 6 months worth of funds had been appropriated; and (ii) whether the nominating authorities have the duty to reassign other funds to cover the deficiency of Law 52 funds, even if such deficiency was known at the time of the appointment.

On remand, the District Court ordered the parties to submit simultaneous motions for summary judgment based on the evidence presented at trial. The oppositions to said motions were also to be simultaneous, which the parties submitted. The District Court scheduled an evidentiary hearing regarding the due process issues on remand. Evidentiary Proceedings on the issue of liability were held on August 9-14, 2007. After the parties submitted simultaneous briefs and

replies, on September 28, 2007 the District Court issued an *Order* granting Respondents' request for summary judgment in their favor.

On November 29, 2007 the District Court issued its reasons for granting summary judgment in favor of Respondents as to the due process claims – the only existing claim on remand – and expressly denied the certification request to the PRSC. *Acevedo-Feliciano v. Ruiz-Hernández*, 524 F.Supp.2d 150, (Pet. App. B). The District Court found that because (purported) surplus funding in the municipal budget was readily available in January 2001 to underwrite the Law 52 appointments until June 2001, the Municipality of Aguada was obligated to fund said positions until said date, and the Municipality's action to terminate the positions without affording the Respondents a pre-termination hearing violated their due process rights under the Fourteenth Amendment.

The District Court also scheduled a Jury Trial to determine the damages resulting from the putative infringement of Respondents' due process rights. *Id.* On April 10, 2008 the Jury returned a verdict on damages for the Respondents in the amount of $15,000.00 in compensatory damages and $4,960.00 in back pay, for each Respondent and against all Defendants, without making the appropriate allotment as to each Defendant and each Plaintiff; as well as a verdict of punitive damages in the amount of $7,500.00 against each of the individual Defendants Miguel A. Ruiz-Hernández and Glenda L. Peña-Muñoz; for a total of $34,960 per Plaintiff/Respondent. According to the verdict, all twenty-two (22) Respondents were entitled

to the same amount in damages, regardless of their particular circumstances. Furthermore, the amount of back pay ($4,960.00) was rendered in a lump sum fashion. *Judgments* were issued on even date.

All Defendants duly presented their *Motion to Alter Judgment* and *Motion for Judgment Notwithstanding* Verdict, which were opposed by Respondents. On June 9, 2008, District the Court denied Defendants' post-verdict requests for relief. A *Notice of Appeal* was filed with the only surviving claim being that of procedural due process.

The First Circuit Court affirmed. (Pet. App. A). The Court found that certification in this case was "more than a little late" and refused to certify the issue of first impression to the PRSC. Acknowledging that nine years of litigation had elapsed,[1] Petitioner averred that the

1. It is respectfully clarified that the Petitioner asked the District Court to certify to the PRSC the state law questions **before** losing at trial. Only after the First Circuit's 2006 remand – with the attending determination that the issue that the District Court needed to address was unsettled under Puerto Rico law – did it become evident that this discretionary and extraordinary procedure was warranted. Until then, the Defendants (including Petitioner) agreed with the District Court's original assessment to the effect that Mayor Roman's decision to extend Respondents' 1-year Law 52 appointment in the face of a 6-month monetary grant was *ultra vires* in nature as he was purporting to bind the municipal government to the payment of funds beyond what he knew was allotted for such purposes. Thus, Petitioner moved the District Court for certification of this central question of state law as soon as it was identified by the First Circuit as needing to be addressed, and should not be penalized for the mere passage of time when it moved for certification in an expeditious and timely manner.

certification request was not tardy and the First Circuit had certified unsettled questions of state law at an even later stage of the proceedings, on appeal, and even *sua sponte*. *See, In re Hundley v. Marsh,* 603 F.3d 95 (1st Cir. April 29, 2010). The request for certification was submitted to the District Court as soon as it became apparent that there was/is no controlling authority under Puerto Rico law on whether a transitory appointment for a period that exceeds the appropriated funds creates an expectancy of continued employment subject to procedural due process guarantees.

Furthermore, not only did the First Circuit err in denying certification of this unsettled and important issue of state law to the PRSC – to wit, whether Respondents had a proprietary interest under state law – it is respectfully submitted that the First Circuit's independent judgment in interpreting the applicable state law did not follow the submitted analogous decisions by the PRSC and incorrectly predicted how the PRSC would interpret said statutes. The Court found that because "the Municipality acted in ways to confirm plaintiffs' contractual expectations... the plaintiffs had a property interest in continued employment under state law." Pet App. A.

On July 7, 2010, the First Circuit denied Petitioner's petition for rehearing or rehearing *en banc.* Pet. App. F.

REASONS FOR GRANTING THE PETITION

Certiorari is generally appropriate to resolve a conflict within the federal circuit courts, to resolve a conflict between the federal circuit courts and a state supreme court, or to decide an important question of federal law. Here, the second ground applies. The current case involves at least two questions of exceptional importance as the First Circuit's decision conflicts with authoritative decisions by the Puerto Rico Supreme Court and from its own Court.

As to the first issue, whether the question posed by this Court on remand to the District Court should have been certified to the PRSC; the First Circuit's decision is contrary to its recent expressions regarding the propriety of certification when applicable state law is unclear and thus, of first impression, as set forth in *In re Hundley v. Marsh*, 603 F.3d 95 (1st Cir. April 29, 2010), and Judge Torruella's dissent in *González-Figueroa v. J.C. Penney*, 568 F.3d 313, 323-324 (1st Cir. 2009).

Regarding the second issue, whether the Plaintiffs had a proprietary interest under state law; the First Circuit's independent judgment in interpreting the applicable state law does not follow the submitted analogous decisions by the PRSC and incorrectly predicts how the PRSC would interpret said statutes.

A. The First Circuit's decision conflicts with authoritative decisions by the Puerto Rico Supreme Court and from its own Court.

The fact that the First Circuit Court granted qualified immunity to the individual defendants and vacated the punitive damages award with prejudice, stating that "Puerto Rican law was unclear as to whether plaintiffs had a right to continued employment and so whether any constitutionally protected interest was involved at all" is revealing. Notwithstanding the Circuit Court's *Opinion* in this case, until the PRSC resolves this controversy, the implementation and scope of the applicable state law will remain unclear and the lower courts will be following erroneous First Circuit precedent.

The Supreme Court of Puerto Rico is authorized to entertain any matter of Puerto Rico law which may determine via certification the outcome of a case pending in federal court and to which no clearly established precedent is available. *See, Pan American Computer Corp. v. Data General Corp.*, 112 PR Dec. 780, 788 (1982); and *Cuesongle v. Ramos*, 835 F.2d 1486 (1st Cir. 1987). In the instant litigation: (1) questions of state law are certainly involved since the interpretation of Law 52, the Autonomous Municipalities Act, and other statues related to appointments and municipal budgeting are indispensable for adjudication of the case; (2) the issue involved (i.e., the existence of a property interest under Puerto Rico law) is certainly a determinant factor to this and other state and federal cases to come; and (3) there is absolutely no Puerto Rico Supreme Court case law regarding this particular issue,

nor has the Puerto Rico Legislature ever legislated in this regard. *Panamerican, supra.*

In the recent case of *In re Hundley v. Marsh*, 603 F.3d 95, 96 (1st Cir. 2010), the First Circuit in a *Per Curiam* opinion, expressed that:

> At its discretion, a federal court of appeals may certify questions of state law to the state's highest court. *Lehman Bros. v. Schein, 416 U.S. 386, 391, 94 S. Ct. 1741, 40 L. Ed. 2d 215 (1974).* When Massachusetts law is at issue, the SJC has provided that we may certify questions to it in cases where we "find [] no controlling precedent and where the questions may be determinative of the pending cause of action." *In re Engage, Inc., 544 F.3d at 52*; *Mass. S.J.C. R. 1:03* (providing for certification "if there are involved in any proceeding before [the federal court] questions of law of this State which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of this court"). **On occasion, we will certify such questions to a state's highest court on our own motion when neither party has requested certification.**

Id. Citations omitted.

Although the First Circuit found that certification in the current case was "more than a little late",

notwithstanding that nine years of litigation has elapsed, it is reiterated that Petitioner's request was not tardy. It was made as soon as it became apparent that there was/is no controlling authority under Puerto Rico law on whether a transitory appointment for a period that exceeds the appropriated funds creates an expectancy of continued employment subject to procedural due process guarantees.

At this point, and after remand from the First Circuit, Petitioner immediately submitted to the District Court that the only assurance that said court's ruling would be sustained in a further appeal was by certifying the state-law question to the PRSC. The District Court had already decided the matter in the Defendants' favor, according to its interpretation of the applicable state law, and the First Circuit still found a lack of reference to Puerto Rico law.

Moreover, even in cases where the parties do not ask for certification, as occurred in *In re Hudley, supra*, the First Circuit can still find that the conditions of the PRSC's certification rule are satisfied; justifying the exercise of its discretion in favor of certification. Particularly since in this case, the issue of first impression of whether "the Municipality could choose [or was barred from using] general municipal funds to pay for Law 52 positions beyond the funding from the Law 52 grant, so as to create a legitimate expectation of an approximately one-year appointment", has implications well beyond the appearing parties and is certainly likely to recur in the civil rights employment context.

Also, it should be considered that this case's resolution required policy judgments about the applicability of Puerto Rico law that the PRSC is in the best position to make. *See generally, In re Hudley, supra,* citing *In re Engage, Inc.*, 544 F.3d 50, 53 (1st Cir. 2008) ("[C]ertification is particularly appropriate here since the answers to these questions may hinge on policy judgments best left to the Massachusetts court and will certainly have implications beyond these parties.").

The best course of action in this case should have been for the federal courts to file a *Petition for Certification* before the Office of the Clerk of the PRSC. Guidance from the Puerto Rico Supreme Court would have avoided the procedural convolutions faced by the parties in the present case and resolved the controversies once and for all.

As such, we hereby recall the words by Judge Torruella in his dissent in *González-Figueroa v. J.C. Penney,* 568 F.3d 313, 323-324 (1st Cir. 2009), wherein he stated the following:

> As "the existing case law does not provide sufficient guidance to allow us reasonably to predict" how the Puerto Rico Supreme Court would resolve this issue, *In re Engage, Inc.*, 544 F.3d 50, 57 (1st Cir. 2007), I am firmly convinced that this appeal presents precisely the type of question that the certification process was designed to address. *See Muñiz-Olivari v. Stiefel Labs, Inc.*, 496 F.3d 29, 39-40 (1st Cir. 2007). Because I conclude that its

> resolution should thus come from the Supreme Court of Puerto Rico, I respectfully dissent.
>
> Our intervention under the circumstances is not only risky (and perhaps, even presumptuous) but also unwise and impolitic, considering the procedures that are readily available to resolve this conundrum.

Id. at 323-324, citing P.R. Laws Ann. tit. 32, app. III, Rule 53.1(f); *VanHaaren v. State Farm Mut. Auto Ins, Co.*, 989 F.2d 1, 3 (1st Cir. 1997).

Further, as in *González-Figueroa, supra*, the circumstances of this case present a "quintessential example of the conditions that render certification proper under the law of this circuit". 568 F.3d at 324. As in said case, there is an acknowledged absence of controlling precedent from the Puerto Rico Supreme Court on this unresolved issue. *See id.*, and *Engage*, 544 F.3d at 53.

Finally, concerning comity, it is detrimental for a matter as sensitive and crucial such as a municipality's budgets and appointment prerogatives under Puerto Rico law to be determined by the federal judiciary as a matter of first impression instead of the PRSC. Certification is thus an essential tool towards achieving what the Supreme Court has dubbed a "cooperative judicial federalism". See *Arizonans for Official English v. Arizona*, 520 U.S. 43, 76 (1997).

B. The First Circuit's decision is in clear conflict with subsequent analogous Puerto Rico Supreme Court precedent.

Without certification, or abstention for that matter, there would be no relief for state high court review of a potentially erroneous federal decision based on state law. Certification in this case not only would have represented deference for state sovereignty, but would have guaranteed the correct result, instead of the erroneous precedent set forth by the First Circuit, which will unfortunately impact many future decisions in the federal court system.

In the current case, the First Circuit Court's denial of certification was compounded by the Court's erroneous independent judgment in interpreting the applicable state law, when it did not follow the submitted analogous decisions by the PRSC and incorrectly predicted how the PRSC would interpret said statutes. This Court found that because "the Municipality acted in ways to confirm plaintiffs' contractual expectations... the plaintiffs had a property interest in continued employment under state law." Pet. App. A.

There is nothing in state law to support such conclusion. On the contrary, the Court disregarded completely, as it does not even mention, the analogous decisions by the PRSC, which were submitted as partial certified translations to the Court and which are in direct conflict with this holding.

As a matter of established Puerto Rico law, when the government (or municipality), by way of an error,

has granted a right or privilege to a person, this person in turn cannot allege to have an acquired right based on that error. *Magriz v. Empresas Nativas*, 143 D.P.R. 63 (1997). In *Santiago Declet y Albanese v. Department of the Family*, 2001 T.S.P.R. 5, the Puerto Rico Supreme Court reiterated its previous holding that an administrative error does not create a right that compels an agency nor does it hinder its correction. *See also, Gonzalez- Fuentes v. E.L.A.*, 2006 T.S.P.R. 44. Moreover, the existence *vel non* of a property interest is contingent upon the existence of an obligation to continue paying Plaintiffs/Repondents' salaries rather than a mere possibility to allot funds for such purposes.

Puerto Rico law goes to great extents to structure personnel administration. The Autonomous Municipalities Act [AMA] clearly differentiates between several kinds of transitory positions, mainly by the purpose or reason for which these fixed-term positions are created: 1) transitory positions under funded projects; 2) transitory positions for emergency circumstances; 3) transitory positions within the career-positions structure. See 21 P.R. Laws Ann. §§ 4553 (c), 4554 (c) and 4556 (e).

All transitory positions —as any other— constitute obligations for the municipal budget, and therefore, **must** appear in the budget presented prior to the beginning of the fiscal year, unless during the year there is a surplus and an adjustment can be made to the budget which would allow the creation of additional positions. *De Jesus Ortiz v Rivera Vargas*, 140 D.P.R. 470, 476 (1996); 21 P.R. Laws Ann. §§ 4302 (b) (3) and (c) (1); 21 P.R. Laws Ann. § 4309. Therefore, by May 2000,

the Municipality of Aguada officials were required, by law, to create and budget all transitory positions therein, which would be paid with municipal funds during fiscal year 2001. Failure to do so barred the Municipality's ability to pay for any obligation not included in the Budget.

Regarding that point, Section 4303 of the AMA states that "it shall be mandatory to include appropriations with sufficient credits" to pay all obligations regarding salaries, among others." 21 P.R. Laws Ann. § 4303. In fact, municipalities can only use the funds of a fiscal year for the "payment of expenses legitimately obligated and incurred during the respective year" and "no amounts whatsoever may be spent or obligated in a fiscal year that exceed the appropriations and funds authorized by ordinances and resolutions for said year". *Id.* Moreover, in an election year, no personnel transaction is authorized in a period of two months prior and after Election Day. 21 P.R. Laws Ann. § 4564.

Further, the Puerto Rico Supreme Court has consistently expressed that within the context of municipal contracts "the good administration of the government is a virtue of democracy and a part of it is good administration implies to carry out its functions as a buyer with efficiency, honesty and correctness in order to protect the interest and money of the public to which the government represent." *Mar-Mol Co. Inc. v. Adm. de Servicios Generales*, 126 D.P.R. 864, 871(1990); *Félix Ríos, et. als. v. Municipio de Isabela, et. als*, 159 D.P.R 839 (2003). *See also, Las Marías Lab. Corp. v. Mun. de San Juan*, 159 D.P.R 868 (2003); *Fernández &*

Gutiérrez v. Municipio de San Juan, 147 D.P.R. 824, 829 (1999).

In the case of *Quest Diagnostics v. Mun. de San Juan*, 2009 T.S.P.R. 77 (May 14, 2009), the PRSC reiterated the strictures of government (and municipal) contracting, which provide for a series of formalities, requisites and procedures that must be met in order to be valid, **and any failure to follow said formalities renders the contract, null and void**. In turn, 21 P.R. Laws Ann. § 4366, provides in the relevant part:

> § 4366. On contracts
>
> Every contract executed in contravention of the provisions of this section **shall be null and ineffective**. If public funds have been invested, said amount may be recovered in behalf of the municipality through the proper action filed to such purpose.

(Emphasis ours).

> In *Quest Diagnostics, supra*, the PRSC expressed the following:
>
> These legal rules and their interpretative jurisprudence pursue to foment the effectiveness, honesty and correction in protection of the interests of the town. *Cordero Vélez v. Municipality of Guánica*, [2007 T.S.P.R. 24]. The established principle provides that to obligate public funds it is necessary to follow the procedures established

> in law, thus promoting, an untarnished strong public administration. *Cordero Velez v. Municipality of Guánica, supra.* The courts are the guardians of the legal dispositions directed to protect the disbursement of public funds, since they protect the public interest and not of the contracting parties. *Hatton v. Municipality of Ponce*, 134 D.P.R. 1001 (1994).

Translation from original.

Repeatedly, the PRSC has also expressed that the private entities have the duty to assure the compliance of the law upon hiring with the municipalities, or they assume any losses therein. *Colón v. Mun. of Arecibo*, 2007 T.S.P.R 61. Consequently, the PRSC has also determined the inapplicability of any remedy in equity suffered by not following the strict established formalities, essentially denying payment for services rendered, even in cases where the services had already been performed. *Las Marias Lab. v. Mun. of San Juan, supra.*

As can be ascertained by the submitted PRSC opinions, if no funds were allocated to pay for the Law 52 contracts as per the aforementioned strictures of governmental contracting, and said funds were included in the municipal budget thereunder, said contract was null and void. As a null and void contract, the contract in this case could not provide the Respondents with a proprietary interest after December 31, 2000. Accordingly, no due process was due to the Respondents. Any letter of appointment by the former

Mayor that announced positions until June 2001 was an *ultra vires act* by said individual and therefore, null and void.

Therefore, the Circuit Court's independent judgment of the applicable Puerto Rico law and its finding that the Municipality of Aguada could (and as such, was obligated to) pay the unfunded portion of the Plaintiffs' Law 52 contracts, is in clear conflict with the submitted PRSC opinions and should be vacated.

CONCLUSION

In *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984), this Honorable Court sent a clear message to the federal court system: "It is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment."

If the First Circuit Court's decision is allowed to stand, it would be federal court and not the PRSC who resolves an issue of tremendous public policy importance as a matter of first impression and erroneously. This will certainly impact the holdings of other cases and litigants; in contravention with analogous PRSC jurisprudence and in contravention to the deference federal courts should afford state courts.

Accordingly, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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October, 2010

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DECIDED JUNE 3, 2010

No. 08-1989

CARLOS CONCEPCION CHAPARRO; MARITZA ACEVEDO-ORAMA; YARITZA ACEVEDO-ORAMA; ELIZABETH ACEVEDO-ORAMA; MIGDALIA ACEVEDO-ORAMA; JOSE A. MENDEZ-VALLE; ANGEL CASTRO-GONZALEZ; MIGUEL A. CORTES-ROMAN; WILLIAM ROSA-FIGUEROA; MIGUEL TORRES-PEREZ; EDWIN ACEVEDO-ACEVEDO; RAUL PANETO-COLON; MARIA PANETO-COLON; GILBERTO VARGAS-RIOS; AMILCAR MUNIZ-ROSADO; ADELAIDA ROSARIO-GALLOZA; ANGEL L. JIMENEZ-ACEVEDO; EDWIN VILLARRUBIA-SOTO; JOSE VILLANUEVA-RODRIGUEZ; JOSE A. CUEVAS-HERNANDEZ; ELBA I. QUINTANA-ROMAN; RAMONITA ACEVEDO-MUNOZ; PABLO VILLANUEVA-RUIZ; THUALIA MUNIZ-SANTONI; GLORIVEE SUAREZ; RAMONITA RODRIGUEZ-VARELA; ANIBAL MENDEZ-ACEVEDO, Plaintiffs, Appellees, EILEEN S. SANCHEZ-FELICIANO; SANTIAGO HERNANDEZ-RUIZ, Plaintiffs, v. MIGUEL A. RUIZ-HERNANDEZ, in his official capacity as mayor of the Municipality of Aguada and in his personal capacity; GLENDA L. PENA-MUNOZ, in her official capacity as the Municipality of Aguada's human resources director and in her personal capacity; ANIBAL MENDOZA, in his official capacity as the Municipality of Aguada's public works director and in

his personal capacity, Defendants/Third-Party Plaintiffs, Appellants, MUNICIPALITY OF AGUADA, PUERTO RICO, Defendant, Appellant.

JUDGES: Before Lynch, Chief Judge, Torruella and Howard, Circuit Judges.

OPINION BY: LYNCH

OPINION

LYNCH, *Chief Judge*. . . . This is the second appearance here of a civil rights suit under *42 U.S.C. § 1983* brought by a group of twenty-two contract employees against the Municipality of Aguada in Puerto Rico and two municipal officers. *See Acevedo-Feliciano v. Ruiz-Hernandez (Acevedo-Feliciano IV), 447 F.3d 115 (1st Cir. 2006)*. That opinion, with which we assume familiarity, states the underlying facts.

In the earlier phases of this case, before the appeal and remand, a jury rejected plaintiffs' claim that they suffered political party affiliation discrimination in violation of their *First Amendment* rights. This left only one federal claim in the case: whether plaintiffs had, on the facts of this case, a sufficient property interest in their employment by the Municipality to invoke federal constitutional procedural due process rights and whether those rights were violated.

Between June and September 2000, the (now-former) mayor of Aguada gave plaintiffs approximately

one-year contracts of employment with the Municipality, through June 30, 2001. These contracts stated that plaintiffs' employment was "by way" of a grant from the Commonwealth to the Municipality under Law 52. That law authorizes the Commonwealth to grant municipalities certain funds to promote local employment. *See P.R. Laws. Ann. tit. 29, § 711c.* . . . Law 52 funds initially paid for plaintiffs' salaries. After six months of funding under Law 52 ended on December 31, 2000, plaintiffs were paid for another month with municipal funds. The Municipality terminated their employment on January 31, 2001, without notice or hearing, some five months shy of the expiration of their contracts.

In order for plaintiffs to have procedural due process rights in their employment, each plaintiff must have had a reasonable expectation, based on a statute, policy, rule, or contract, that he or she would continue to be employed. *See Wojcik v. Mass. State Lottery Comm'n, 300 F.3d 92, 101 (1st Cir. 2002)*. These interests are commonly called "property interests," and we look to state law to see if such property interests exist. *Acevedo-Feliciano IV, 447 F.3d at 121* (citing *Bishop v. Wood, 426 U.S. 341, 344, 96 S. Ct. 2074, 48 L. Ed. 2d 684 (1976)*). Whether these property interests rise to a level sufficient to trigger procedural due process protections remains a federal question. *Id.*

In our prior decision, we vacated the district court's entry of judgment in favor of defendants, which was based on its determination that "either the Law 52

contract or municipal law required that each plaintiff's hiring contract be read to include the implicit condition that the term of employment was conditioned on the Municipality's receipt of Law 52 funding." *Id. at 122.*

After a discussion of Law 52 and pertinent municipal law, we held that this rationale was not dispositive or supported, that more analysis was needed, and that Puerto Rican law on the subject was unclear. *Id. at 122-24*. . . We vacated and remanded so the court could address "whether Puerto Rican law supplies any sort of property interest once the Law 52 funding ceased." *Id. at 124.*

On remand, the district court directed both parties to file cross-motions for summary judgment, granted summary judgment for plaintiffs, and held an evidentiary hearing on related facts. The district court held that on the undisputed facts, plaintiffs had a continued expectation of employment even though the Law 52 funding had expired. *See Acevedo-Feliciano v. Ruiz-Hernandez, 524 F. Supp. 2d 150, 154 (D.P.R. 2007)* (*Acevedo-Feliciano V*). It so held because municipal law did not prohibit the Municipality from using general funds to continue paying plaintiffs' salaries, and the Municipality knew it had substantial uncommitted funds when it terminated plaintiffs' contracts. *Id. at 153-54.*

The court further found that plaintiffs' expectation constituted a property interest in continued employment cognizable under the *due process clause. Id. at 154*. . . It also held that there was no indication from

defendants that there were any adequate state remedies. *Id. at 154-55.* After a trial on damages, a jury granted compensatory damages, punitive damages, and back pay to plaintiffs.

The Municipality and the individual defendants have appealed. We address their contentions in turn.

I. *Denial of Certification to Puerto Rico Supreme Court*

After more than nine years of litigation, a prior appeal, and having lost at trial, defendants ask that questions be certified to the Supreme Court of Puerto Rico. The request is more than a little late—it was not raised until after remand—and the district court did not abuse its discretion in denying certification. *See U.S. Steel v. M. DeMatteo Constr. Co., 315 F.3d 43, 53-54 (1st Cir. 2002).*

In addition to being untimely, the two questions defendants ask to be certified are the wrong questions. Defendants say the dispositive, unsettled questions of Puerto Rican law on the procedural due process claim are (1) whether a one-year appointment made under Law 52 creates a legitimate expectation of continued employment for the entire year if, at the time of appointment, the Law 52 allotment was only for six months; and (2) whether the Municipality must continue funding those appointments from other funds once Law 52 funds expire.

The more significant question of Puerto Rican law necessary to resolve plaintiffs' claim, however, is whether, under municipal law, the Municipality could *choose* to use general municipal funds to pay for Law 52 positions beyond the funding from the Law 52 grant, so as to create a legitimate expectation of an approximately one-year appointment. The district court held that the Municipality was allowed, but not required, to do so under municipal law. *See Acevedo-Feliciano V, 524 F. Supp. 2d at 153-54*. The remaining questions concerning the application of that principle to the facts of this case were for the federal court to resolve. We decline to certify, and the district court did not abuse its discretion in declining to do so.

II. *Existence of Procedural Due Process Rights*

The district court granted summary judgment for plaintiffs because it found as a matter of law that plaintiffs had a property interest under state law, which was cognizable under the *due process clause*, and that defendants deprived plaintiffs of that right without due process of law. *Id. at 155*. We review the district court's grant of summary judgment de novo and will affirm if "there is no genuine issue as to any issue of material fact and . . . the movant is entitled to judgment as a matter of law." *Agusty-Reyes v. Dep't of Educ., 601 F.3d 45, 52 (1st Cir. 2010)*.

There are no contested material facts. The only questions before us are legal ones, specifically (1) whether, based on contractual, policy, or other sources

derived from Puerto Rican law, plaintiffs had a property interest in continued employment with the Municipality; (2) whether that interest is a constitutionally protected right under the *due process clause of the federal Constitution*; and (3) whether the Municipality deprived plaintiffs of that right without providing constitutionally adequate process. *See Maymi v. P.R. Ports Auth., 515 F.3d 20, 29 (1st Cir. 2008)*. Plaintiffs satisfied all these conditions, and we affirm the district court's grant of summary judgment in their favor.

A. *Existence of Property Interests*

We first address whether plaintiffs had a reasonable expectation of continued employment, based on their contracts, surrounding Puerto Rican law, and the facts of the case. We hold that they did.

The undisputed facts[1] established that when the Municipality hired plaintiffs, the contracts committed the Municipality to employing plaintiffs for almost a year, through June 30, 2001, though the Municipality knew that the Law 52 grant expired on December 31, 2000, approximately six months into that period.

The Municipality also had the power to commit to employing plaintiffs for their full contractual terms,

1. Contrary to defendants' assertions, because the procedural due process question was appropriately resolved on undisputed facts on summary judgment, there is no *Seventh Amendment* issue. *See, e.g., Darr v. Town of Telluride, 495 F.3d 1243, 1252 (10th Cir. 2007)*.

despite the limited duration of the Law 52 funds. Law 52 does not, by its terms, prohibit municipalities from supplementing Law 52 monies with municipal funds, *see P.R. Laws. Ann. tit. 29, § 711c*, and the Commonwealth's Law 52 agreement with the Municipality here specifically provided that "[i]f the Municipality offers to the employees other benefits which are not part of this agreement, the Municipality assumes responsibility therefore and pays them with its funds." *Acevedo-Feliciano IV, 447 F.3d at 123.*

Nor was the Municipality prohibited by law from making this commitment. Indeed, the Autonomous Municipalities Act authorizes the mayor to propose readjustments to the Municipality's general expenses budget when there are anticipated surpluses. *See P.R. Laws. Ann. tit. 21, § 4309.*

Further, it is undisputed that the Municipality acted in ways to confirm plaintiffs' contractual expectations. After the Law 52 funds expired, the Municipality paid plaintiffs for some weeks out of municipal funds, confirming plaintiffs' expectation that their employment would continue under their contracts even after the Law 52 funds expired. This is sufficient to show that plaintiffs had a property interest in continued employment under state law.

B. *Interests Cognizable as Procedural Due Process Rights*

Plaintiffs' property interest in continued employment under their approximately one-year

contracts is a recognized procedural due process right. This circuit's law holds that a one-year term of employment with Puerto Rican government bodies is generally considered a protected property interest for procedural due process purposes. *See Acevedo-Feliciano IV, 447 F.3d at 121*; *Caro v. Aponte-Roque, 878 F.2d 1, 4 (1st Cir. 1989)*.

C. *Deprivation of Plaintiffs' Due Process Rights*

Finally, we consider, and reject, defendants' argument that plaintiffs were not deprived of protected property interests without due process of law because the process Puerto Rico provided was adequate.

The plaintiffs' basic claim is that the Municipality deprived them of their property interest in continued employment pursuant to an official policy: the mayor, the Municipality's official policymaker, made the final decision to terminate plaintiffs, and the parties stipulated before the district court that no pre-termination hearing was provided.

Defendants advance two arguments as to why state processes provided plaintiffs with all the process they were due. First, defendants say that, in practice, the Municipality provided plaintiffs with all the process they were due because plaintiffs were given notice and a collective opportunity to comment on their termination in the meeting where they were handed their termination notices. That argument is foreclosed by our earlier conclusion, based on the parties' previous

submissions before this court, that "none of the plaintiffs were granted a pre-termination hearing." *Acevedo-Feliciano IV, 447 F.3d at 118-19.*

Second, defendants say that under *Parratt v. Taylor, 451 U.S. 527, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981)*, and its progeny, plaintiffs cannot make out a *§ 1983* claim without showing the inadequacy of existing state remedies, and that plaintiffs have failed to carry that burden. Defendants rely on cases involving random and unauthorized state deprivations of property interests, in which a pre-termination hearing is, by definition, infeasible and the question becomes whether the state's post-deprivation processes are enough to protect plaintiffs' rights. *See, e.g., Chmielinski v. Massachusetts, 513 F.3d 309, 315 (1st Cir. 2008).* That is plainly not the kind of violation alleged here.[2]

III. *Claims against Individual Defendants*

A. *Qualified Immunity*

Though the individual defendants repeatedly asserted that they were entitled to qualified immunity both before and after the remand, the district court did

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2. Nor is this a case in which plaintiffs sought to vindicate a right that had elapsed before suit was filed. Rather, plaintiffs were "denied a right by virtue of which [they were] presently entitled . . . to pursue a gainful occupation," and that right cannot "be fully protected by an ordinary breach-of-contract suit." *Lujan v. G&G Fire Sprinklers, Inc., 532 U.S. 189, 196, 121 S. Ct. 1446, 149 L. Ed. 2d 391 (2001).*

not address this question on remand.[3] Instead, having granted plaintiffs summary judgment on their procedural due process claim, the district court held that the only remaining issue was to determine how much the Municipality and the individual defendants owed plaintiffs in damages.[4] *See Acevedo-Feliciano V*, *524 F. Supp. 2d at 155*.

Defendants took all steps necessary to preserve this claim. They again raised it in their April 4, 2003, motion for judgment as a matter of law before the first jury trial, *see Acevedo-Feliciano v. Ruiz-Hernandez (Acevedo-Feliciano III)*, *275 F. Supp. 2d 162, 164, 167-*

3. In August 2002, during the initial stages of this case, the district court deemed one effort by the individual defendants to present the qualified immunity question at summary judgment to be untimely due to failure to comply with the court's deadlines. *See Acevedo-Feliciano v. Ruiz-Hernandez (Acevedo-Feliciano I)*, No. 01-1445 (D.P.R. Aug. 16, 2002) (order denying defendants' motion for summary judgment). On an interlocutory appeal, we affirmed the untimeliness ruling on February 3, 2003. We added that "the qualified immunity defense, if properly asserted in the defendants' pleadings and otherwise properly maintained and presented, will still be available at trial; the only consequence of the district court's refusal to entertain the summary judgment motion on the qualified immunity question has been to preclude a pretrial resolution of the issue." *See Acevedo-Feliciano v. Ruiz-Hernandez (Acevedo-Feliciano II)*, No. 02-2287 (1st Cir. Feb. 3, 2003) (unpublished judgment).

4. To the extent that plaintiffs claim otherwise, nothing in our prior decision precluded the individual defendants from continuing to assert, on remand, that they were entitled to qualified immunity.

68 (D.P.R. 2003) (denying defendants qualified immunity on the *First Amendment* claim but avoiding the question on the due process claim by holding that plaintiffs had no procedural due process right in continued employment). They also raised it after remand in their motion for summary judgment on the procedural due process claim, in their motion for judgment as a matter of law, and in their motion for judgment notwithstanding the verdict.

We hold that the individual defendants are entitled to qualified immunity. Even when plaintiffs make out a violation of a constitutional right, officials are entitled to qualified immunity unless that right was also "clearly established at the time of [their] alleged misconduct." *Pearson v. Callahan, 129 S. Ct. 808, 816, 172 L. Ed. 2d 565 (2009)* (internal quotation marks omitted). Whether a right is clearly established in turn depends on the clarity of the law at the time of the violation and whether, on the facts of the case, a reasonable official would know that his actions violated plaintiffs' constitutional rights. *See Walden v. City of Providence, 596 F.3d 38, 53 (1st Cir. 2010)*. . . We hold that the individual defendants are entitled to qualified immunity because the defendants could not have reasonably known in 2001 that plaintiffs had a constitutionally protected right under the *due process clause*.

Our previous decision established that Puerto Rico law was unclear as to whether plaintiffs had any rights to continued employment once the Law 52 funding ended. *See Acevedo-Feliciano IV, 447 F.3d at 124*. The

various pleadings submitted on municipal law at summary judgment amply demonstrate the lack of clarity. Indeed, the district court had originally concluded that Puerto Rican law established that plaintiffs had no such rights, *see Acevedo-Feliciano III, 275 F. Supp. 2d. at 166-67*, and then reversed that determination on remand, *see Acevedo-Feliciano V, 524 F. Supp. 2d at 152-54*, relying in both instances on roughly the same provisions of Commonwealth and municipal law. Given the intricate maze of Commonwealth and municipal law regarding employment under Law 52, no reasonable official would have known, in 2001, that terminating plaintiffs' approximately one-year contracts because Law 52 funds had expired would violate plaintiffs' procedural due process rights.

Because the individual defendants are entitled to immunity, we vacate the judgment against them and remand with instructions to dismiss all claims against the individual defendants with prejudice. This ruling does not, however, affect the Municipality's liability. *See Walden, 596 F.3d at 55 n.23*.

B. *Award of Punitive Damages*

The jury awarded punitive damages to each of the twenty-two plaintiffs in the sum of $ 15,000 each, which was allotted as $ 7,500 against each of the two individual defendants. It was error, indeed plain error, to submit this issue to the jury.

Punitive damages in a *§ 1983* civil rights action can be granted at the jury's discretion only if "the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith v. Wade, 461 U.S. 30, 56, 103 S. Ct. 1625, 75 L. Ed. 2d 632 (1983)...* This court has "emphasized that the 'evil motive,' 'intent,' or 'reckless or callous indifference' pertains to the '*defendant's knowledge that [he] may be acting in violation of federal law.*'" *Davignon v. Hodgson, 524 F.3d 91, 110 (1st Cir. 2008)* (alteration in original) (quoting *Iacobucci v. Boulter, 193 F.3d 14, 25-26 (1st Cir. 1999)).*

Puerto Rican law was unclear as to whether plaintiffs had a right to continued employment and so whether any constitutionally protected interest was involved at all. Given the complexity of the Commonwealth and municipal law at issue, it cannot logically be true that the individual defendants knew they may have been acting in violation of federal law. We vacate the punitive damages award and order dismissal of the punitive damages claim with prejudice on remand.

IV. *Award of Damages against the Municipality*

As to each of the twenty-two plaintiffs, the jury awarded $ 15,000 in compensatory ("suffering and anguish") damages and $ 4,960 for back pay jointly and severally against defendants. We need not determine whether this is the appropriate measure of damages for

a procedural due process violation; it is enough that the Municipality has never challenged it.

Indeed, the Municipality's only challenge to the back pay award is a specific argument that the award improperly included for each plaintiff a $ 500 Christmas bonus for 2001. There was no error in the district court's denial of remittitur on these grounds. Plaintiffs had a property interest in their employment through June 30, 2001, and under Puerto Rican law, any employee who works for the government for at least six months of a calendar year is entitled to an annual Christmas bonus. *See P.R. Laws Ann. tit. 3, § 757.* There was sufficient evidence to support the award of the bonus.

We have considered the rest of the arguments made by each side and either have no need to reach them or have concluded they are without merit.

V. *Conclusion*

We *vacate* the judgments against the individual defendants including the punitive damages award against them. We *remand* with instructions to dismiss all claims against the individual defendants with prejudice. Otherwise, the judgment against the Municipality is *affirmed.* No costs are awarded.

So ordered.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO DECIDED NOVEMBER 27, 2007 FILED NOVEMBER 29, 2007

CIVIL 01-1445CCC

ENRIQUE ACEVEDO-FELICIANO, CARLOS CONCEPCION-CHAPARRO, EILEEN B. SANCHEZ-FELICIANO, JOSE A. MENDEZ-VALLE, ANGEL CASTRO-GONZALEZ, MIGUEL A. CORTES-ROMAN, WILLIAM ROSA-FIGUEROA, MIGUEL TORRES-PEREZ, EDWIN ACEVEDO-ACEVEDO, RAUL PANETO-TORO, GILBERTO VARGAS-RIOS, AMILCAR MUNIZ-ROSADO, ADELAIDA ROSARIO-GALLOZA, ANGEL L. JIMENEZ-ACEVEDO, EDWIN VILLARRUBIA-SOTO, JOSE VILLANUEVA-RODRIGUEZ, JOSE A. CUEVAS HERANNDEZ, ELBA I. QUINTANA-ROMAN, RAMONITA ACEVEDO-MUNOZ, PABLO VILLANUEVA-RUIZ, THUAILA MUNIZ-SANTONI, GLORIVEE SUREZ, ANIBAL MENDEZ-ACEVEDO, SANTIAGO HERNANDEZ-RUIZ, RAMONITA RODRIGUEZ-VARELA, Plaintiffs vs MIGUEL A. RUIZ-HERNANDEZ, in his official capacity as Mayor of the Municipality of Aguada and in his personal capacity; GLENDA L. PENA-MUNOZ, in her official capacity as the Municipality of Aguada's Human Resources Director and her personal capacity; ANIBAL MENDOZA, in his official capacity as the Municipality of Aguada's Public Works Director and his personal capacity; MUNICIPALITY OF AGUADA, Defendants vs JULIO CESAR ROMAN, Third-Party Defendant

Appendix B

JUDGES: CARMEN CONSUELO CEREZO, United States District Judge.

OPINION BY: CARMEN CONSUELO CEREZO

OPINION

STATEMENT OF REASONS FOR SUMMARY JUDGMENT

On September 28, 2007, the Court issued an Order (docket entry 399) ruling on the pending cross-motions for summary judgment on the due process issue filed by the parties on November 20, 2006 (docket entries 325 & 326). The decision was based on the testimonial and documentary evidence submitted during the evidentiary hearing held on August 9, 10, 13 and 14, 2007 and the post-hearing briefs. Plaintiffs' motion for summary judgment was granted while defendants' was denied, without statement of reasons at the time. The Court now sets forth its analysis, findings of fact and conclusions of law on the summary disposition of the only pending matter, plaintiffs' due process claim. The relevant procedural events are the granting of defendants' *Fed.R.Civ.P. 50* motion for judgment as a matter of law on the procedural due process claim, the jury verdict for defendants on the *First Amendment* claim, the judgment of the Court of Appeals vacating the judgment on the procedural due process claim and remanding for further proceedings consistent with its opinion. The judgment that was vacated was issued on June 12, 2003 (docket entry 182) pursuant to an Order issued on that same date (docket entry 181).

Appendix B

The Court of Appeals made reference in its decision to its understanding of this Court's *Fed.R.Civ.P. 50* ruling dismissing plaintiffs' procedural due process claims. We quote from the Opinion in this respect:

> As we understand the ruling, the district court determined that either the Law 52 contract or municipal law required that each plaintiff's hiring contract be read to include the implicit condition that the term of employment was conditioned on the Municipality's receipt of Law 52 funding.

Acevedo-Feliciano v. Ruiz-Hernandez, 447 F.3d 115, 121-122 (1st Cir. 2006).

> We understand the district court to have ruled as a matter of law that Law 52, by its terms, prohibits the extension of Law 52-funded jobs using municipal funds. But the law itself contains no such prohibition. . . . The statute does not support the district court's conclusion.
>
> Nothing in the terms of the Law 52 contract between the Commonwealth and the Municipality adds such a prohibition. It is true that the Law 52 contract was effective only "until December 31, 2000," that it listed the "number of months" per worker as six, and that it required that the Law 52 funds be held in a separate account and that no

> expenditures be made from that account beyond the sum in the grant. But none of these provisions forbids, expressly or impliedly, the use of other funds to fill out a contract as to which Law 52 funds had been exhausted.

Id., at pp. 122-123.

> The district court's opinion also appears to say that under municipal law, the Mayor was forbidden from creating jobs (or extending the duration of jobs) unless he had secured, in advance, all of the necessary funds. It may be that under Puerto Rican municipal law the Mayor was acting ultra vires, as the district court found. But at this stage we cannot resolve the question. The district court did not explain why the Mayor's actions should be deemed ultra vires. While the Mayor could not expend more Law 52 monies than he had available, there is no explanation so far as to why the Municipality was precluded from using other sources of funds to meet the commitment to the plaintiffs.

Id., at p. 123.

Having stated the reasons for its disagreement with what it understood the district court determined and having expressed that "[a]bsent clarity on these issues of Puerto Rican municipal law, the best course is to

vacate and remand," *id.*, the Court of Appeals opined that a new trial on the procedural due process issue might not be necessary since the legal question could be susceptible to resolution, in whole or in part, via summary disposition. Twice in its Opinion it defined the issue as follows: "The question is whether a job that began as Law 52 employment may be continued, using municipal funds, after the Law 52 funding expires," *id. at n. 7, p. 122*, and "[w]hat we have been discussing is whether Puerto Rican law supplies any sort of property interest once the Law 52 funding ceased." *Id., at p. 124.*

This Court ordered the parties to file cross-motions for summary judgment and scheduled an evidentiary hearing. Plaintiffs were required to present the testimonies of the financial directors under the New Progressive Party (NPP) Mayor Julio Cesar Roman administration that hired them and under the Popular Democratic Party (PDP) Mayor Miguel Ruiz-Hernandez administration that terminated them, in addition to any other evidence. Having heard the testimony of the witnesses and having considered the documentary evidence presented during the post-trial evidentiary hearing on the summary judgment motions and the parties' written memoranda, the Court finds that the following material facts are undisputed.

Plaintiffs were hired by the Municipality of Aguada pursuant to a one-year employment contract which ended on June 30, 2001. Their salaries for the first six (6) months were paid from Law 52 funds, a special financial grant available under a program established

by the Commonwealth of Puerto Rico to ameliorate unemployment. *See 29 L.P.R.A. §711(c)*. . . Their Law 52 contracts were funded by the Commonwealth of Puerto Rico through December 31, 2000, six months before the June 30, 2001 termination date established by NPP Mayor Roman in the hiring letters.

Defendant Miguel Ruiz-Hernandez from the PDP won the November 7, 2000 elections in Aguada and was sworn into office on January 9, 2001, after the funding for plaintiffs' Law 52 contracts had expired. Plaintiffs continued to be paid their salaries through the month of January 2001 by the Municipality utilizing municipal funds.

The new Mayor sent on January 31, 2001, to all of the plaintiffs termination letters informing that their Law 52 work contracts had expired on December 31, 2000 and that the Law 52 funding had ceased. None of the plaintiffs were granted a pre-termination hearing.

Despite the cessation of the Law 52 grant as of December 30, 2000, the Municipality of Aguada had available the use of municipal funds to pay the plaintiffs' salaries for the remaining five months of their one-year employment contract. Therefore, their jobs, which began as specially-funded Law 52 employment, could be continued through June 30, 2001 since the Municipality could assume financial responsibility by paying plaintiffs' salaries with its funds after the Law 52 funds had been exhausted. Defendants knew this since the second half of Fiscal Year 2000-20001 which is

the relevant timeframe.

Defendant's argument that "as of January 31, 2001 there was no identifiable source of funds at the Municipality for responsibly committing to pay an additional five months of salaries"[1] is defeated by objective financial data on record. As of September 5, 2000, when Resolution No. 22 was issued (Exhibit 6 for plaintiffs), there was a $ 424,000.00 surplus derived from the cash on hand available corresponding to Fiscal Year 1998-1999, after deductions. As of June 30, 2000, the Municipality had an available surplus of $ 965,464.00, as shown in its Ordinance No. 44 dated June 30, 2000 (Exhibit 1 for plaintiffs). The $ 965,464.00 surplus corresponds to the cash on hand available at the end of Fiscal Year 1999-2000, which immediately preceded the fiscal year corresponding to plaintiffs' contracts. Such surplus had been confirmed by an external audit conducted in November 2000. This audit was done before the external audit of the Municipality prepared on December 19, 2001 (Exhibit 4 for plaintiffs), six months after expiration of Fiscal Year 2000-2001.

Such data clearly reflects that neither the Municipality nor its Mayor had to await for the December 2001 audit, as averred by defendants, to decide whether there was enough cash on hand as of February 2001 to pay $ 167,000.00, the approximate sum equivalent to the salaries of all plaintiffs for the following

1. Memorandum of Law in Support of Defendants' Contention on the Due Process Claim (docket entry 394), at p. 9.

five months. Defendants' contention that the December 2001 external audit serves to corroborate their theory since the final amount of the surplus reported therein was reduced to $ 186,038.00 ignores the fact that, as of the second half of Fiscal Year 2000-2001, it had a surplus that had accumulated from past fiscal years. This is supported by the available objective data corresponding to Fiscal Years 1998-1999 and 1999-2000 that, as of November 2000, had already been scrutinized by external auditors of the Municipality. The surplus available, as shown in Exhibits 1 and 6, was derived from an excess of revenues and other financing sources over expenditures in Fiscal Years 1998-1999 and 1999-2000. Such surplus could have been used to pay for the remaining five months of plaintiffs' one-year service contracts, just as they chose to use it for other needs.

The clearest indicator that there was a surplus fund available to defendant Ruiz-Hernandez' administration for this purpose is plaintiffs' Exhibit 1, Ordinance No. 44, which provides for a readjustment of $ 100,000.00 with surplus cash on hand as of June 30, 2000, for the purpose of increasing the existing credit within the waste disposal account of the budget. This ordinance was issued and approved on June 4, 2001 by the Municipal Assembly and June 6, 2001 by defendant Mayor Ruiz-Hernandez pursuant to Article 7.009 of the Autonomous Municipalities Act, *21 L.P.R.A. §4309* which identifies "the surplus remaining as cash on hand as of June 30 of each year, after the budget is closed and the debts chargeable to said balance have been met," as one of the sources of readjustment to the general budget.

Appendix B

The readjustment authorized by Ordinance No. 44 on June 4 and 6, 20001 was possible because as the second Whereas of such Ordinance reads, the Finance Director certified to the Municipal Assembly that the Municipality had determined a surplus remaining as cash on hand as of June 30, 2000 after the budget was closed and the debts chargeable to said balance were met. Given the known, objective financial data, Mayor Ruiz did not need a crystal ball, as claimed, to have destined, by readjustments, the amount necessary to cover plaintiffs' salaries on the remaining five months of their one-year contract just as he did not need the powers of a clairvoyant to approve the $ 100,000.00 adjustment during that same fiscal year to address other Municipality needs.

As stated before, there is no dispute that plaintiffs' one-year contracts of employment with the Municipality could have been continued, after expiration of the Law 52 funds, using municipal funds as authorized by *§4309* of the Autonomous Municipalities Act. Accordingly, plaintiffs had a reasonable expectation that they would continue to be employed by the Municipality until completion of their one-year contracts. They have, therefore, shown a property interest under Puerto Rican law. *Cf. Acevedo-Feliciano v. Ruiz-Hernandez, 447 F.3d at 121* ("Under our case law a one-year contract of employment with a Puerto Rico government body usually suffices to show a property interest sufficient under Commonwealth law.")

Whether defendants' property interest in their one-year employment contracts under Puerto Rico law rises

to the level of a legitimate claim of entitlement that would serve to set off the protections of procedural due process under federal constitutional law is a settled question, as it has been repeatedly established that a property interest in continued employment constitutes a legitimate claim of entitlement sufficient to trigger procedural due process requirements. *See Goss v. Lopez, 419 U.S. 565, 573, 95 S.Ct. 729, 42 L. Ed. 2d 725 (1975)*; *Connell v. Higginbotham, 403 U.S. 207, 91 S.Ct. 1772, 29 L. Ed. 2d 418 (1971)*; *Wieman v. Updegraff, 344 U.S. 183, 191-192, 73 S.Ct. 215, 97 L. Ed. 216, (1952)*; *Arnett v. Kennedy, 416 U.S. 134, 164, 94 S.Ct. 1633, 1649, 40 L. Ed. 2d 15* (Powell, J., concurring); *171, 94 S.Ct. at 1652* (White, J., concurring and dissenting).

Finally, while the Court of Appeals in its Opinion also noted that it was an open question whether existing state remedies were adequate making a passing reference to *Lujan v. G&G Fire Sprinklers, Inc., 532 U.S. 189, 121 S. Ct. 1446, 149 L. Ed. 2d 391 (2001)*, we find that such an inquiry is unnecessary given the facts of this case. In *Lujan*, the Supreme Court held that the availability of a breach of contract action under state law provided constitutional due process to a party who was deprived of payment by the state under a contract where the state maintained that the party had failed to comply with the contract terms and the party claimed it had complied. *Lujan*, however, explicitly distinguished its facts from cases where the plaintiffs had established that they were "presently entitled" to pursue gainful employment, as is the situation in the case at bar. *See Baird v. Board of Educ. for Warren Community Unit*

School Dist. No. 205, 389 F.3d 685, 691 (7th Cir. 2004). In any event, even assuming that the holding of *Lujan* were applicable to the facts of this case, defendants have failed to show that there were existing post-termination remedies offered by the Municipality which would have adequately addressed plaintiffs' due process rights.

Thus, plaintiffs were entitled to due process before being terminated, which "typically includes 'some kind of hearing' and 'some pretermination opportunity to respond.'" *Acevedo-Feliciano v. Ruiz-Hernandez, 447 F.3d at 121* (quoting *Cleveland Bd. Of Educ. v. Loudermill, 470 U.S. 532, 542, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985)).* . . But, as observed by the Court of Appeals, "none of the plaintiffs were granted a pre-termination hearing." *Id., at p. 118-119.* Accordingly, their constitutional right to due process of law was infringed by defendants, and for that reason plaintiffs' Motion for Summary Judgment (docket entry 325) was granted on September 28, 2007 (docket entry 399) and summary judgment is now hereby issued in their favor on that claim.

A settlement conference will be held on December 18, 2007 at 4:45 P.M. If the case is not settled, the trial on the damages resulting from the infringement of plaintiffs' due process rights will be held on February 28, 2008 at 10:00 A.M.

SO ORDERED.

At San Juan, Puerto Rico, on November 27, 2007.

S/ CARMEN CONSUELO CEREZO

United States District Judge

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DECIDED MAY 11, 2006

No. 04-1154

ENRIQUE ACEVEDO-FELICIANO, ET AL., Plaintiffs, Appellants, v. MIGUEL A. RUIZ-HERNANDEZ, ET AL., Defendants, Appellees.

JUDGES: Before Boudin, Chief Judge, Selya and Lynch, Circuit Judges.

OPINION BY: LYNCH

OPINION

LYNCH, ***Circuit Judge***. . . Plaintiffs and appellants are twenty-two former temporary employees of the Municipality of Aguada, Puerto Rico. Each held a contract stating that the term of employment was effective through June 30, 2001, but also stating that the employment was "by way" of a particular financial grant (a "Law 52" grant, explained further below) that the Municipality had received from the Commonwealth. Funding under that grant was exhausted on December 31, 2000, and the Municipality, under a new Mayor, terminated plaintiffs' contracts one month later on the basis of lack of Law 52 funding.

Plaintiffs sued the Municipality and individual municipal officers (in their official and personal capacities) under *42 U.S.C. § 1983* on two federal claims

and related state claims. They alleged that the termination of their contracts before the expiration dates, without a pretermination hearing, violated their procedural due process rights under the U. S. Constitution. They also alleged that their contracts were terminated because they belonged to a different political party, the New Progressive Party (NPP), than the newly elected Popular Democratic Party (PDP) mayor of the Municipality in violation of the *First Amendment*. Plaintiffs sought injunctive and declaratory relief, back pay, front pay, economic and punitive damages, pre- and post-judgment interest, and other relief.

At trial on June 16, 2003, after the close of plaintiffs' evidence, the district court granted judgment under *Rule 50, Fed. R. Civ. P.*, for defendants on the procedural due process claim. The court held that the plaintiffs had no property interest in further employment inasmuch as the program in which they were employed depended upon receipt of the Law 52 funding from the Commonwealth which had expired on December 31, 2000. The jury considered the *First Amendment* claim and returned a verdict for defendants.

On appeal, the plaintiffs challenge both the *Rule 50* procedural due process ruling and the denial of a motion for mistrial based on a nearly three-month delay in the middle of the trial proceedings. They do not challenge the jury verdict. As to the denial of the motion for mistrial, we find no abuse of discretion and affirm. As to the procedural due process claim, however, we vacate and remand for further consideration.

Appendix C

I.

The Commonwealth established the Law 52 program more than twenty-five years ago. Under the program, *see P.R. Laws Ann. tit. 29, § 711c*, Puerto Rico "subsidizes locally managed programs to ameliorate unemployment." *Gomez v. Rivera Rodriguez, 344 F.3d 103, 107 (1st Cir. 2003)*... Municipalities do not have an automatic entitlement to Law 52 grants: a municipality must submit a proposal describing how it will use the money; such proposals must be approved by the Commonwealth's Department of Labor and Human Resources (DLHR). *Id.* Once a grant is approved, the Commonwealth and the municipality sign a contract specifying how much money the municipality will receive, over what term, and how many jobs it will subsidize. The various Law 52 contracts between the Municipality of Aguada and the DLHR contained standard clauses stating that the Municipality "committed itself to create" the number of jobs specified, and that "under no circumstances will it be construed that people hired [by virtue of the Law 52 contract] are or act as employees of the [DLHR]."

On July 1, 2000, a new Law 52 agreement ("the Law 52 contract") between the Municipality and the DLHR took effect. Under the contract's provisions, the DLHR awarded the Municipality $ 295,908 to pay the salaries and benefits of the forty-five employees through December 31, 2000. The Law 52 contract required the Municipality to keep the Law 52 funds separate from other municipal funds.

Appendix C

The plaintiffs are among the forty-five workers hired by the Municipality in connection with this Law 52 grant. Between June 20 and September 1, 2000, each of the plaintiffs received letters ("the hiring letters") signed by then-Mayor Julio Cesar Roman, appointing them to various municipal jobs, including carpentry and labor positions. The stated starting dates for these jobs ranged from July 1 to September 6, 2000. The stated termination date for each job was the same: June 30, 2001.

Mayor Roman was a member of the NPP, as is each of the plaintiffs. It is noteworthy that the Mayor's letter used an employment date for the plaintiffs through June 2001, despite the fact the Law 52 funding lasted only through December 2000, and that he did so in the face of an upcoming municipal election in which control of the municipal government might switch to the opposing political party. Defendants rely on this to argue that the Mayor acted ultra vires in using a termination date of June 30.

The hiring letters signed by Mayor Roman varied only slightly in their terms. A typical letter, such as the one sent to plaintiff Jose Mendez Valle, stated:

> Allow me by these means [to] appoint you to hold the post of Laborer by way of the Labor Department Proposal[1] for this Municipal Administration.

1. It is clear that "the Labor Department Proposal" is a reference to the Municipality's request for Law 52 funding from the DLHR.

> The same shall be effective September 6, 2000 until June 30, 2001. You shall earn a monthly salary of $ 837.00.

As of the autumn of 2000, then, the twenty-two plaintiffs were all employed by the Municipality and receiving salaries paid out of Law 52 funds. On November 7, 2000, elections were held in Aguada, and a new mayor, defendant Miguel Ruiz-Hernandez of the PDP, was elected. The twenty-two plaintiffs had supported the new Mayor's opponent in the mayoral race. [2]

Mayor Ruiz-Hernandez was sworn into office on January 9, 2001. By this time, the funding provided by the Law 52 contract had expired. The Municipality nonetheless continued plaintiffs' employment through the month of January, paying their salaries out of municipal funds. On January 31, however, Mayor Ruiz-Hernandez sent letters to the plaintiffs ("the firing letters") informing them that the Law 52 funds had expired a month earlier and that their jobs were therefore being terminated. A typical firing letter, this one addressed to plaintiff Edwin Acevedo Acevedo, read as follows:

> I hereby inform you that your work contract through the Proposal of the Department of Labor and Human Resources (Law 52)

2. The opponent was not Mayor Roman; he had not run for reelection.

> expired on December 31, 2000. The previous administration failed in not informing you that your contract expired and that your functions ceased on the aforementioned date.
>
> We do not have the funds that the Department of Labor and Human Resources provided for these contracts. That is why we have to dispense with your services. We regret the inconveniences this may cause you.

All of the plaintiffs' jobs were terminated on January 31; none of the plaintiffs were granted a pre-termination hearing, although each had notice (via the firing letters) that the stated reason for termination was the expiration of Law 52 funding.

On February 12, 2001, less than two weeks later, the Municipality and the DLHR entered into a new Law 52 contract, which provided funding for forty positions from February 16 through June 30, 2001. None of the plaintiffs were offered any of the jobs created by these funds, despite the fact that defendant Glenda Pena-Munoz, the new municipal human resources director appointed by Mayor Ruiz-Hernandez, had promised them they would be recalled when new Law 52 funds were procured.

The plaintiffs filed suit on April 12, 2001, against the Municipality, Mayor Ruiz-Hernandez, and Human Resources Director Pena-Munoz.[3] In response to plaintiffs' political discrimination claim, defendants

countered that the terminations had nothing to do with political animus, but were instead inevitable and proper given the cessation of Law 52 funding. And as to the procedural due process claim, defendants argued that Mayor Roman had had no authority to offer the plaintiffs contracts that outlasted the Law 52 funding; thus the contracts were void as to a June 30 termination date, and no pre-termination hearing was required under the *Due Process Clause*.[4]

Jury trial began on March 19, 2003. On April 4, plaintiffs rested. Defendants moved for judgment as a matter of law pursuant to *Fed. R. Civ. P. 50(a)* as to the political discrimination and procedural due process

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3. Plaintiffs also sued municipal Director of Public Works Anibal Mendoza, but the district court dismissed Mendoza from the case prior to the verdict, and plaintiffs do not appeal as to him. The defendants filed a third-party complaint against former Mayor Roman; this complaint likewise was dismissed by the district court, and Mayor Roman is not a party on appeal.

4. Defendants also argued, in the district court and on appeal, that some of the Municipality's Law 52 employees had not just a hiring letter in their personnel files, but also a second letter from Mayor Roman, identical to the first except for the fact that it stated a term of employment through December 31, 2000. Defendants imply that Mayor Roman knew he had to shorten plaintiffs' terms of employment, that he took steps to do so, but that he reversed course after his party lost the election, either by removing the second letter from the plaintiffs' files or by inserting a third letter with identical terms to the first. Defendants point to a smattering of evidence in the record that lends support to this idea. The district court did not mention this evidence in granting judgment on the due process claims.

claims. On June 16, 2003, during an extended hiatus in the trial (discussed further below), the district court entered judgment for the defendants on the procedural due process claim but allowed the political discrimination claim to proceed. Trial resumed on July 1 on the plaintiffs' remaining claims and the jury rejected the political discrimination claim on July 18.[5]

II.

A. *Denial of Mistrial Based on The Trial Delay*

Plaintiffs argue the district court erred in not granting their motion for mistrial.

On April 4, 2003, the day the plaintiffs rested, the district court authorized the jury forewoman to take a previously scheduled vacation from April 11 through April 27 and halted the trial pending her return. None of the parties objected to this continuance, despite having had the chance to do so both on April 4 and at

5. As to the negligence issue, the jury found for the plaintiffs only against the Municipality itself, not defendants Mayor Ruiz-Hernandez and Pena-Munoz. On August 12, 2003, the Municipality moved for post-trial judgment as a matter of law pursuant to *Fed. R. Civ. P. 50(b)*. . . It argued that since plaintiffs had centered their negligence claim on the actions of Mayor Ruiz-Hernandez and Pena-Munoz, and since the jury had found both not liable, the Municipality itself could not be liable either. In a December 19, 2003 order, the district court agreed and entered judgment for the Municipality. The plaintiffs have not appealed from this ruling.

sidebar on April 2.

On April 24, the district court announced a date for resumption of the trial, noting that it had two additional trials scheduled for May and that another juror had told the court he would be away from May 30 to June 22. The district court decided that the trial would not reconvene until June 23. Again, there were no objections.

On June 17, after the trial had already been on hold for two-and-a-half months and only a week before it was to resume, plaintiffs raised their first objection to the delay, moving for a mistrial.[6] The district court rejected the motion three days later. In a June 26 explanatory order, the court stated that

> calendar exigencies and the unopposed absence of two jurors in this case were the only reasons for the interruption . . . . The adjournment was compelled under the circumstances since the Court could neither vacate the trial settings in the other cases nor did the plaintiffs in this case oppose the absence of the two jurors who took annual leave.

Review of denial of a motion for mistrial is for abuse of discretion. *Rodriguez-Torres v. Caribbean Forms*

6. The belated objection came a day after the district court granted judgment in favor of the defendants as to the due process claims.

Mfr., Inc., 399 F.3d 52, 62 (1st Cir. 2005). We will not reverse if there is no showing of prejudice. *See, e.g., Ferrara & DiMercurio v. St. Paul Mercury Ins. Co., 240 F.3d 1, 12 (1st Cir. 2001)*; *Clemente v. Carnicon-P.R. Mgmt. Assocs., 52 F.3d 383, 388 (1st Cir. 1995)* (finding no abuse of discretion in part because appellant did not "demonstrate[] actual prejudice"). Plaintiffs argue that prejudice may be presumed from a protracted delay after the close of plaintiffs' evidence. They cite supporting case law to this effect from other courts. *See Young & Simon, Inc. v. Merritt Sav. & Loan, Inc., 672 F.2d 401 (4th Cir. 1982)*; *Citron v. Aro Corp., 377 F.2d 750 (3d Cir. 1967)*. . . But whether prejudice may be presumed or not is not the point.

More important here is that plaintiffs did not offer any objection when consulted about the time off requested by the two jurors. As the district court pointed out in denying the mistrial request, plaintiffs had multiple opportunities to object to the initial three-week hiatus, and they did not do so. To the contrary, they explicitly told the district court they had no objection. Plaintiffs argue that their lack of objection "may" have stemmed from their concern "that the vacationing juror . . . could have become indisposed with plaintiffs for ruining her leisure time." If that were so, then plaintiffs made a tactical choice with which they must live. It may not be so: the record makes clear that the district court offered plaintiffs the chance to object at sidebar, out of the jury's presence, and they declined. This was still a tactical choice. As to the second portion

of the continuance, the plaintiffs did not object until June 17, one week before trial was scheduled to resume.

Plaintiffs did too little, too late. *See Clemente, 52 F.3d at 388* (refusing to find an abuse of discretion in the district court's denial of a mistrial where appellant had not "preserved her rights"); *id. at 388 n.5* (noting that "the time to complain . . . is at the outset" and that "plaintiff did not make a peep" when the district court took the action which plaintiff later said warranted a mistrial). The cases plaintiffs rely on do not help them in the face of their failure to object. *See Young & Simon, 672 F.2d at 402 n.2* (ordering a new trial and repeatedly emphasizing that "counsel timely and persistently objected to the [delay] when it was proposed, when it occurred, and after the trial ended"); *Citron, 377 F.2d at 753* (ordering a new trial despite a lack of objection to the delay, but emphasizing that the trial judge had told counsel that he was not going to cancel a planned trip "for this case or any other case," thus making clear in advance that objection would be futile). The district court did not abuse its discretion.

B. *Rule 50 Motion Re: Procedural Due Process*

The district court's grant of defendants' *Rule 50(a)* motion as to the procedural due process claim is subject to de novo review. *Burton v. Town of Littleton, 426 F.3d 9, 14 (1st Cir. 2005)*. "We review the evidence, taking all inferences in favor of [plaintiffs], and ask whether a reasonable jury could have found defendants liable based on the evidence presented." *Id.*

Appendix C

In a due process claim stemming from the termination of employment, "a public employee must first demonstrate that he has a reasonable expectation, arising out of a statute, policy, rule, or contract, that he will continue to be employed." *Wojcik v. Mass. State Lottery Comm'n, 300 F.3d 92, 101 (1st Cir. 2002).* We determine whether such a property interest exists "by reference to state law." *Bishop v. Wood, 426 U.S. 341, 344, 96 S. Ct. 2074, 48 L. Ed. 2d 684 (1976).*

While state law may create property interests, it is a separate question of federal law whether those interests rise to the level of a legitimate claim of entitlement sufficient to trigger procedural due process protections. *See Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 9, 98 S. Ct. 1554, 56 L. Ed. 2d 30 (1978)* ("Although the underlying substantive interest is created by 'an independent source such as state law,' federal constitutional law determines whether an interest rises to the level of a 'legitimate claim of entitlement' protected by the *Due Process Clause.*" (quoting *Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972))).*

If the employee has such a state property interest, and that property interest rises to the level of a "legitimate claim of entitlement," *id.*, then the employer cannot dismiss the employee without affording him due process of law. *See, e.g., Gomez v. Rivera Rodriguez, 344 F.3d 103, 111 (1st Cir. 2003).* In the public employment context, the required process typically includes "some kind of hearing" and "some pretermination opportunity to respond." *Cleveland Bd.*

of Educ. v. Loudermill, 470 U.S. 532, 542, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985).

Under our case law a one-year contract of employment with a Puerto Rico government body usually suffices to show a property interest sufficient under Commonwealth law. *See, e.g., Caro v. Aponte-Roque, 878 F.2d 1, 4 (1st Cir. 1989).* Plaintiffs here argue that they had approximately one-year contracts of employment, that those contracts had not yet expired, and therefore that defendants were required to give them pre-termination hearings.

The district court disagreed, finding that plaintiffs had no property interest in their employment past December 31, 2000, the day Law 52 funding expired. As we understand the ruling, the district court determined that either the Law 52 contract or municipal law required that each plaintiff's hiring contract be read to include the implicit condition that the term of employment was conditioned on the Municipality's receipt of Law 52 funding.

The district court's stated reasoning was as follows. The former mayor, it held, "lacked authority under the Law 52 contract then in effect" between the Municipality and the DLHR to extend the appointments beyond the term of funding specifically set forth in the award under Law 52. In response to the plaintiffs' argument that the former mayor could have "extended" plaintiffs' appointments and paid them using municipal funds, the district court stated that it "need not delve into that

possibility" because "in making the appointments the former Mayor made sole and express reference to the Law 52 'proposal' as the mechanism which made them possible." The court relied on the hiring letters and their references to appointments "by way of" the Law 52 funding agreement. The court concluded:

> The former Mayor clearly acted ultra vires in making appointments to Law 52 posts for terms that exceeded the duration of the Law 52 grant, and in so doing failed to extend plaintiffs' property interest in continued employment in their positions beyond the term established in the Law 52 contract.

The court correctly referred to precedent to the effect that (1) illegally obtained public employment confers no property interest on the employee, *see Rosario-Torres v. Hernandez-Colon, 889 F.2d 314, 319-20 (1st Cir. 1989)* (en banc), and (2) written assurances in a letter of engagement are insufficient to contravene a "comprehensive network of statutory and regulatory directives governing the terms of . . . employment," *Correa-Martinez v. Arrillaga-Belendez, 903 F.2d 49, 54-55 (1st Cir. 1990), overruled on other grounds by Educadores Puertorriquenos en Accion v. Hernandez, 367 F.3d 61, 64 (1st Cir. 2004).*

On appeal, plaintiffs argue that the due process interest was created by the hiring letters, which themselves do not explicitly limit the terms of the appointments to the limits on Law 52 funding. They say the Mayor had authority to enter into a contract of a

term of one year legally, without limits under Law 52, by providing additional funding from the municipal budget.

We understand the district court to have ruled as a matter of law that Law 52, by its terms, prohibits the extension of Law 52-funded jobs using municipal funds. But the law itself contains no such prohibition. Indeed, the law speaks only in general terms: it states that funds disbursed thereunder shall be used to promote, inter alia, "employment opportunities in occupations with future possibilities," "jobs that are in demand in the present market," and "the creation of high productivity employment opportunities." *P.R. Laws Ann. tit. 29, § 711c(b)*. . . It further states that "said moneys may also be used to maintain existing jobs, extend their duration, modify compensation as [a] transitory remedial measure in situations that may involve possible job loss, when it is deemed justifiable in the Secretary's judgment." *Id. § 711c(c)*. The statute does not support the district court's conclusion.[7]

Nothing in the terms of the Law 52 contract between the Commonwealth and the Municipality adds such a

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7. Defendants cite *Gomez v. Rivera Rodriguez, 344 F.3d 103, 107 (1st Cir. 2003)*, for the proposition that "Law 52 employment is contingent upon Law 52 funding." Whether or not this is true, it is not the question here. The question is whether a job that began as Law 52 employment may be continued, using municipal funds, after the Law 52 funding expires.

prohibition. It is true that the Law 52 contract was effective only "until December 31, 2000," that it listed the "number of months" per worker as six, and that it required that the Law 52 funds be held in a separate account and that no expenditures be made from that account beyond the sum in the grant. But none of these provisions forbids, expressly or impliedly, the use of other funds to fill out a contract as to which Law 52 funds had been exhausted. Indeed, the seventh paragraph of Agreement provides:

> The incentive approved shall be applied to the salary and fringe benefit costs of the employments agreed upon in this contract. If the Municipality offers to the employees other benefits which are not part of this agreement, the Municipality assumes responsibility therefore and pays them with its funds.

Of considerable significance is that the Municipality did, in fact, provide non-Law 52 money from municipal coffers to fund the plaintiffs' contracts for one month, January 2001. The defendants explain this on the ground that they continued to pay the plaintiffs only while they investigated whether the Law 52 funding had in fact been exhausted. Perhaps a jury could so conclude, but because municipal funds were used, it is difficult to conclude as a matter of law that there was a prohibition on the use of municipal funds to fund plaintiffs' employment through June 30. The same is true for the rationale, used by the district court, that the contract mentioned only Law 52 funding. Given the glancing

nature of the reference in the hiring letters to Law 52 funding, that rationale is not dispositive.

The district court's opinion also appears to say that under municipal law, the Mayor was forbidden from creating jobs (or extending the duration of jobs) unless he had secured, in advance, all of the necessary funds. It may be that under Puerto Rican municipal law the Mayor was acting ultra vires, as the district court found. But at this stage we cannot resolve the question. The district court did not explain why the Mayor's actions should be deemed ultra vires. While the Mayor could not expend more *Law 52* monies than he had available, there is no explanation so far as to why the Municipality was precluded from using other sources of funds to meet the commitment to the plaintiffs. The plaintiffs' brief on appeal argues, in contrast, that the former mayor was fully empowered to use municipal funds (even those not yet allocated) to extend the duration of jobs created

8. Plaintiffs argue that the mayor unquestionably had such authority because under "basic principles of budgeting," he could have taken note of the fact that the Municipality had received Law 52 grants for many years in a row and anticipated that the Municipality would receive another such grant in 2001. We are unconvinced. Defendants, for their part, argue that "in the absence of funds earmarked for the salaries of improperly appointed Law 52 employees, the Municipality cannot pay for such expenses unless it makes a readjustment based on a budgetary surplus." But the law defendants cite for this proposition, *P.R. Laws Ann. tit. 21, § 4309*, does not support it. The provision merely states when and under what circumstances a legislature may adjust a municipal budget; it contains no other express limitations or proscriptions. *See id.*

by other means. But it, too, has cited to no law that supports its conclusion.[8]

Absent clarity on these issues of Puerto Rico municipal law, the best course is to vacate the judgment and remand to the district court. Since a new trial on the procedural due process issue may not be necessary — for example, the legal questions may be susceptible to resolution, in whole or in part, via summary judgment — we leave it to the district court to determine the nature of the proceedings to follow.[9] *See Rivera Alicea v. United States, 404 F.3d 1, 4 (1st Cir. 2005).*

We add a few points. What we have been discussing is whether Puerto Rican law supplies any sort of property interest once the Law 52 funding ceased.

That still leaves the question, assuming plaintiffs have some property interest under Commonwealth law, of whether such state property interests are among those which give rise to a "legitimate claim to entitlement protected by the federal due process clause" and whether existing state remedies are adequate. *See Lujan v. G & G Fire Sprinklers, Inc., 532 U.S. 189, 195-96, 121 S. Ct. 1446, 149 L. Ed. 2d 391 (2001).*

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9. We also note an admission in plaintiffs' brief: "Plaintiffs submit . . . that, although clearly related, plaintiffs' employment contracts' effectiveness was not contingent on the availability of Law 52 funds. This is not to say that termination of those funds would not have given rise to good cause to terminate the relevant employment contracts."

III.

We *affirm* the denial of the mistrial motion. We *vacate* the judgment of the district court for defendants with respect to the procedural due process claim and *remand* the case for further proceedings consistent with this opinion. No costs are awarded.

APPENDIX D — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO DECIDED DECEMBER 19, 2003 FILED DECEMBER 19, 2003

CIVIL 01-1445CCC

ENRIQUE ACEVEDO-FELICIANO CARLOS CONCEPCION-CHAPARRO EILEEN B. SANCHEZ-FELICIANO JOSE A. MENDEZ-VALLE ANGEL CASTRO-GONZALEZ MIGUEL A. CORTES-ROMAN WILLIAM ROSA-FIGUEROA MIGUEL TORRES-PEREZ EDWIN ACEVEDO-ACEVEDO RAUL PANETO-TORO GILBERTO VARGAS-RIOS AMILCAR MUNIZ-ROSADO ADELAIDA ROSARIO-GALLOZA ANGEL L. JIMENEZ-ACEVEDO EDWIN VILLARRUBIA-SOTO JOSE VILLANUEVA RODRIGUEZ JOSE A. CUEVAS HERANNDEZ ELBA I. QUINTANA-ROMAN RAMONITA ACEVEDO-MUNOZ PABLO VILLANUEVA-RUIZ THUAILA MUNIZ-SANTONI GLORIVEE SUREZ ANIBAL MENDEZ-ACEVEDO SANTIAGO HERNANDEZ-RUIZ RAMONITA RODRIGUEZ-VARELA, Plaintiffs vs MIGUEL A. RUIZ HERNANDEZ, in his official capacity as Mayor of the Municipality of Aguada and in his personal capacity; GLENDA L. PENA-MUNOZ, in her official capacity as the Municipality of Aguada's Human Resources Director and her personal capacity; ANIBAL MENDOZA, in his official capacity as the Municipality of Aguada's Public Works Director and his personal capacity; MUNICIPALITY OF AGUADA, Defendants vs JULIO CESAR ROMAN, Third-Party Defendant

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JUDGES: CARMEN CONSUELO CEREZO, United States District Judge.

OPINION BY: CARMEN CONSUELO CEREZO

OPINION

OPINION AND ORDER

On July 18, 2003, after nineteen days of trial, a jury returned a verdict in this case finding that defendants Miguel A. Ruiz-Hernandez (Ruiz-Hernandez) and Glenda L. Pena-Munoz (Pena-Munoz) were not liable to any of the plaintiffs for acts of political discrimination or negligence allegedly committed against them, while defendant, the Municipality of Aguada, (Municipality) was found liable to the plaintiffs only on their negligence claims. *See* Verdict Forms (docket entries 219-240). Before the Court now is the Motion for Judgment as a Matter of Law filed by the Municipality on August 12, 2003 (**docket entry 269**), which plaintiffs opposed on August 19, 2003 (**docket entry 273**).

The Municipality contends that it cannot be held liable to the plaintiffs on their negligence claims as the jury determined that its two officers sued, Ruiz-Hernandez and Pena-Munoz, were not liable on those claims, and that no liability can be imposed based on the acts of former mayor Julio Cesar Roman (Roman) because he was not a defendant in the action. Plaintiffs maintain, however, that as the Municipality failed to

present these arguments in its pre-verdict *Fed.R.Civ.P. 50* motion, they have been waived.

A review of the procedural milestones of the case is essential in order to understand and dispose of the issue before us. On April 12, 2001, plaintiffs filed their complaint (docket entry 1), which they amended on May 11, 2001 (docket entry 3). In their complaint, they brought claims under *42 U.S.C. § 1983* premised on political discrimination and the infringement of their due process rights and under Puerto Rico's tort statutes, Articles 1802 and 1803 of the Civil Code for the alleged negligent termination of their employments against defendants Ruiz-Hernandez in his official capacity as Mayor of the Municipality of Aguada and in his personal capacity, Pena-Munoz in her official capacity as the Municipality's Human Resources Director and in her personal capacity, and against the Municipality itself.[1] It is important to note that, throughout the amended complaint, the Municipality is claimed to be liable solely because of the acts of the individual defendants sued. *See e.g.* PP 30, 32 (docket entry 3).

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1. Plaintiffs also sued Mr. Anibal Mendoza both in his official capacity as the Municipality's Director of Public Works and in his personal capacity. The claims against him were voluntarily dismissed by the plaintiffs after they finished presenting their evidence at trial. *See* docket entry 173. In addition, the Court dismissed the due process claims upon defendants' request in their *Fed.R.Civ.P. 50* motion presented after plaintiffs rested. *See* docket entry 181. Thus, neither the claims against Mendoza nor the due process claims were submitted to the jury.

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On December 28, 2001, defendants moved to bring the former mayor of the Municipality, Roman, as a third-party defendant (docket entry 38). Plaintiffs, however, vehemently opposed his inclusion in the action claiming that "neither under the Due Process, nor the *First Amendment* causes of action raised by plaintiffs, defendants' third-party complaint would be rationally viable, for liability accruing against defendants from either cause could not be conceivably linked, as a matter of law, to the third-party alleged execution of nuil employment contracts." *See* Motion to Strike Third-Party Complaint (docket entry 47), at p. 5. While the Court initially allowed the filing of the third-party complaint (*see* docket entry 59), it later reconsidered and granted a motion to dismiss filed by third-party defendant Roman (docket entry 88). In doing so, the Court adopted the reasoning espoused by Senior Judge Pieras in a June 6, 2002 Order issued by him in the case of *Echevarria v. Ruiz-Hernandez, et. al.*, Civil No. 01-2719(JP), which relevant parts we quoted then and deem pertinent to restate now:

> . . . The cause of action alleged by the Plaintiffs is not how Plaintiffs were appointed to their jobs by the former Mayor. It is whether the current Mayor and his administration discriminated against Plaintiffs because of their political affiliation. The Defendants' defense is that Plaintiffs' appointment was illegal. Therefore, there was a non-discriminatory reason for the adverse employment decisions.

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> The burden of proof continues to be on the Plaintiffs. Still, the Jury must determine whether political affiliation was a substantial or motivating factor for the adverse employment decisions that affected the Plaintiffs. Therefore, if proven, political discrimination cannot be attributed to anyone else but Defendants. In this way, if Defendants are found to be liable to Plaintiffs for political discrimination, said liability cannot be attributed to former Mayor Julio Cesar Roman who

originally appointed Plaintiffs, because political discrimination is based on an act motivated by political animus, committed by a specific person or entity, in this case, the Defendants herein.

> Defendants' contention that Plaintiffs were dismissed from their positions within the Municipality of Aguada because they were illegally appointed to their positions by the former mayor may be brought at trial as a defense to the allegations of politically motivated discrimination on the part of Defendants. However, these allegations are not the subject of a proper Third-Party Complaint against the former mayor.

See Order dated August 20, 2002 (docket entry 108), at p. 2.

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On September 20, 2002, the Court held the pretrial conference and approved the Pretrial Order proposed by the parties. *See* docket entry 123. Plaintiffs there reiterated that their claims were founded on the defendants' violation of their due process and freedom of speech and association rights, and that "the same factual framework that gives rise to a colorable cause of action pursuant to *42 U.S.C.A. § 1983* is also actionable in this Court under its supplementary jurisdiction pursuant to the Puerto Rico Tort Statute, Articles 1802 and 1803 of the Puerto Rico Civil Code, 31 L.P.R.A. *§§ 5141 and 5142*, . . . for all the causes of action predicated on the Puerto Rico tort statute have their genesis in the same nucleus of operative facts as the federal causes of action." *See* Pretrial Order (docket entry 107), p. 14-15.

The standard for granting judgment as a matter of law under *Fed.R.Civ.P. 50* is well established. The Court must consider the evidence and the inferences reasonably drawn therefrom in the light most favorable to the non-movant. The Court must not consider the credibility of witnesses, resolve conflicts in testimony, or evaluate the weight of the evidence. A verdict may be directed only if the evidence, viewed from this perspective, would not permit a reasonable jury to find in favor of the plaintiff on any permissible claim or theory. *Andrade v. Jamestown Housing Authority, 82 F.3d 1179, 1186 (1st Cir. 1996).*

As our review of the procedural events in the case shows, since the inception of the case plaintiffs focused

their constitutional claims on the actions of the two individual defendants, hinged their tort actions on these defendants' alleged unconstitutional actions, and relied exclusively on their unconstitutional and tortious acts to impute liability on the Municipality. The jury, however, expressly determined that the individual defendants had neither incurred in unconstitutional nor tortious committed acts against any of the plaintiffs. This notwithstanding, it found that the Municipality was liable to the plaintiffs for negligence. Given that the same jury had already exonerated the individual defendants from any liability, it necessarily follows that their finding of negligence on the part of the Municipality is necessarily anchored on what they must have considered to be negligent acts of former mayor Roman. Roman, however, was never sued by the plaintiffs as an individual defendant, they never even suggested that he had incurred in negligent acts for which the Municipality should be held liable to them, and, more importantly, the evidence presented at trial was never developed by any of the parties with a view to establish or refuting the Municipality's liability based on his negligent conduct. Given that the evidence presented at trial would not have allowed a reasonable jury to find in favor of the plaintiffs on their negligence claims against the Municipality, especially when that same jury with that same evidence had determined that the two individual defendants on which the Municipality's liability was premised were themselves not liable, the Municipality is entitled to judgment as a matter of law DISMISSING the claims of negligence brought by the plaintiffs against it. Otherwise, plaintiffs would be collecting on a claim

that they elected not to assert, and for which no evidence was presented to the jury.

Plaintiffs' claim that this argument was untimely raised by the Municipality and thus, waived, is vapid. Clearly, the issue did not materialize until the jury returned its verdict, and it is unreasonable to assume that it could have been anticipated by the Municipality in its **pre-verdict** *Rule 50(a)* motion.

For the reasons stated, the Municipality's Motion for Judgment as a Matter of Law (**docket entry 269**) is GRANTED.

SO ORDERED.

At San Juan, Puerto Rico, on December 19th, 2003.

CARMEN CONSUELO CEREZO

United States District Judge

JUDGMENT

For the reasons stated in the Opinion and Order issued on this same date, judgment as a matter of law is entered under *Fed.R.Civ.P. 50(b)* in favor of the Municipality of Aguada.

Appendix D

SO ORDERED AND ADJUDGED.

At San Juan, Puerto Rico, on December 19th, 2003.

CARMEN CONSUELO CEREZO

United States District Judge

APPENDIX E — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO DECIDED JUNE 12, 2003 FILED JUNE 13, 2003

CIVIL 01-1445CCC

ENRIQUE ACEVEDO-FELICIANO CARLOS CONCEPCION-CHAPARRO EILEEN B. SANCHEZ-FELICIANO JOSE A. MENDEZ-VALLE ANGEL CASTRO-GONZALEZ MIGUEL A. CORTES-ROMAN WILLIAM ROSA-FIGUEROA MIGUEL TORRES-PEREZ EDWIN ACEVEDO-ACEVEDO RAUL PANETO-TORO GILBERTO VARGAS-RIOS AMILCAR MUNIZ-ROSADO ADELAIDA ROSARIO-GALLOZA ANGEL L. JIMENEZ-ACEVEDO EDWIN VILLARRUBIA-SOTO JOSE VILLANUEVA-RODRIGUEZ JOSE A. CUEVAS HERANNDEZ ELBA I. QUINTANA-ROMAN RAMONITA ACEVEDO-MUNOZ PABLO VILLANUEVA-RUIZ THUAILA MUNIZ-SANTONI GLORIVEE SUREZ ANIBAL MENDEZ-ACEVEDO SANTIAGO HERNANDEZ-RUIZ RAMONITA RODRIGUEZ-VARELA, Plaintiffs vs MIGUEL A. RUIZ-HERNANDEZ, in his official capacity as Mayor of the Municipality of Aguada and in his personal capacity; GLENDA L. PENA-MUNOZ, in her official capacity as the Municipality of Aguada's Human Resources Director and her personal capacity; ANIBAL MENDOZA, in his official capacity as the Municipality of Aguada's Public Works Director and his personal capacity; MUNICIPALITY OF AGUADA, Defendants vs JULIO CESAR ROMAN, Third-Party Defendant

Appendix E

JUDGES: CARMEN CONSUELO CEREZO, United States District Judge.

OPINION BY: CARMEN CONSUELO CEREZO

OPINION

RULING ON DEFENDANT'S MOTION FOR JUDGMENT AS A MATTER OF LAW

Before the Court is defendants' Motion for Judgment as a Matter of Law made pursuant to *Fed.R.Civ.P. 50*, as argued by them in open court on April 4, 2003 upon the conclusion of plaintiffs' presentation of evidence, and later supplemented in writing on April 8, 2003 (**docket entry 176**), as well as plaintiffs' arguments in opposition also made in open court and subsequently supplemented in writing on April 7, 2003 (**docket entry 175**). Defendants Miguel Ruiz-Hernandez and Glenda Pena, the Mayor and Human Resources Director of the Municipality of Aguada (Municipality), seek the dismissal of the claims of political discrimination and violation of due process of law brought against them by the twenty-two (22) plaintiffs, all of whom were formerly employed by the Municipality in jobs funded through the Employment Opportunities Development Fund created by Section 2 of Act 52 of August 9, 1991 (*29 L.P.R.A. § 711c*), more commonly known as "Law 52."

In resolving a *Rule 50(a)* motion for judgment as a matter of law, we must:

> examine the evidence and all fair inferences in the light most favorable to the plaintiff and may not consider the credibility of witnesses, resolve conflicts in testimony, or evaluate the weight of the evidence. To warrant submission of an issue to the jury, the plaintiff must present more than a mere scintilla of evidence and may not rely on conjecture or speculation. The evidence offered must make the existence of the fact to be inferred more probable than its nonexistence.

Katz v. City Metal Co, Inc., 87 F.3d 26, 28 (1st Cir. 1996) (internal quotation marks and citations omitted). In order to grant the motion, "we must find that, as a matter of law, the record would permit a reasonable jury to reach only one conclusion as to that issue." *Id.* "If instead fair-minded persons could draw different inferences from the evidence presented at trial, the matter is for the jury." *Espada v. Lugo, 312 F.3d 1, 2 (1st Cir. 2002).*

Thus, we begin our analysis by examining the evidence presented by the plaintiffs, which establishes that between June 20, 2000 and September 1, 2000 all twenty-two plaintiffs received letters from the Municipality's former Mayor, Julio Cesar Roman, informing them of their appointments to a myriad of posts through a "proposal" of the Commonwealth's Department of Labor funded under Law 52. *See* Plaintiffs' Exhibits 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, 35, 37, 39, 41 & 43. Although the

starting dates for the appointments varied from July 1, 2000 until September 6, 2000, all were made effective by the former Mayor until June 30, 2001. A contract between the Municipality and the Department of Labor which provided funding for 45 posts under Law 52, among them those of the plaintiffs, was subscribed on June 30, 2000, and was in effect from July 1, 2000 until December 31, 2000. Under the provisions of said contract, the Municipality was awarded $ 295,908.09 for the payment of salaries and marginal benefits of those 45 employees. Among other specifications, the contract required the Municipality to maintain those funds separate from any other municipal funds, and to return any monies not used by it for the contracted purposes.

As a result of the general elections held in Puerto Rico on November 7, 2000, a new mayor, elected on the Popular Democratic Party (PDP) ticket, was swept into power in Aguada. The new mayor, defendant Ruiz-Hernandez, was sworn into office on January 9, 2001. Shortly thereafter, on January 31, 2001, letters were issued by him to the twenty-two plaintiffs informing them of the expiration on December 31, 2000 of the Law 52 grant which funded their positions, of the concomitant expiration of their appointments on said date, and of their dismissal. *See* Plaintiffs' Exhibits 2, 4, 6, 8, 10, 12, 14, 16, 18, 20, 22, 24, 26, 28, 30, 32, 34, 36, 38, 40, 42, 44. All plaintiffs worked in the Municipality until January 31, 2001. None of them were afforded a hearing prior to their termination. During the month of January 2001, as the Law 52 grant had expired, plaintiffs' salaries were paid with municipal funds. *See* Exhibits 45 & 46.

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Defendant Ruiz-Hernandez and the new Human Resources Director appointed by him, co-defendant Pena, are PDP members. All plaintiffs, in turn, are affiliated to the opposing New Progressive Party (NPP) and had openly supported the NPP's mayoral candidate, Luis Echevarria-Santiago, during the 2000 elections. When the Municipality and the Department of Labor entered into a new Law 52 contract on February 12, 2001, which provided funding for 40 positions from February 16 until June 30, 2001, none of the plaintiffs were offered the opportunity to return to their previous posts, although Pena had promised them that they would be recalled as soon as new Law 52 funds became available. Instead, it appears that PDP affiliates were hired to substitute the dismissed plaintiffs at their jobs.

Against this factual backdrop, defendant Ruiz-Hernandez has moved for the dismissal of the due process claims brought against him,[1] while defendant Pena seeks the dismissal of both the due process and *First Amendment* claims asserted against her. Both defendants also claim to be qualified immune from any damages' claims. Plaintiffs have refuted their assertions. Having reviewed plaintiffs' evidence, and the parties' arguments, we now GRANT the *Rule 50* motion as to plaintiffs' due process claims but DENY it in all other respects.

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1. During oral argument of the *Rule 50* motion, the Mayor had also pressed for the dismissal of plaintiffs' claims under the *First Amendment*. Said request was denied by the Court at the hearing and is no longer pending before us.

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As to the due process claims, it is well established that in order to maintain a constitutional due process claim arising out of the termination of his employment, a public employee must first demonstrate that he has a reasonable expectation, arising out of a statute, policy, rule, or contract, that he will continue to be employed. *Wojcik v. Massachusetts State Lottery Com'n, 300 F.3d 92, 101 (1st Cir. 2002)*. The claim of a protected property interest is determined "by reference to state law." *Id., at p. 102. (quoting Bishop v. Wood, 426 U.S. 341, 344, 96 S. Ct. 2074, 48 L. Ed. 2d 684 (1976))*... Under Puerto Rico law, transitory employees generally do not have a property interest in continued employment beyond the terms of their appointment. *Caro v. Aponte-Roque, 878 F.2d 1, 4 (1st Cir. 1989)*; *see also Departamento de Recursos Naturales v. Correa*, 18 P.R. Offic. Trans. 795, 118 D.P.R. 689, 697 (1987). It has also been held that under Puerto Rico law any property right associated with a position is rendered null and void if the position was illegally obtained. *See Rosario-Torres v. Hernandez-Colon, 889 F.2d 314, 319-20 (1st Cir. 1989)* (collecting cases).

The evidence on record clearly established that the Law 52 grant which funded plaintiffs' positions expired on December 31, 2000. Although in making plaintiffs' appointments the Municipality's former Mayor, Julio Cesar Roman, made them effective until June 30, 2001, he clearly lacked authority under the Law 52 contract then in effect to extend the duration of the appointments beyond the term specifically stipulated therein. While plaintiffs contend that the former Mayor

could have extended the terms of their appointments until the date mentioned in his letters by utilizing municipal funds to pay for their salaries and other benefits once the Law 52 funds were depleted, we need not delve into that possibility as the fact remains that in making the appointments the former Mayor made sole and express reference to the Law 52 "proposal" as the mechanism which made them possible. *See* Plaintiffs' Exhibits 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, 35, 37, 39, 41 & 43. Thus, the former Mayor clearly acted *ultra vires* in making appointments to Law 52 posts for terms that exceeded the duration of the Law 52 grant, and in so doing failed to extend plaintiffs' property interest in continued employment in their positions beyond the term established in the Law 52 contract. Indeed, the Mayor could not effectively confer a property interest on plaintiffs merely by making statements contrary to the Law 52 contract provisions. *Cf. Correa-Martinez v. Arrillaga-Belendez, 903 F.2d 49, 54-55 (1st Cir. 1990)* (holding that written assurances in letter of engagement were insufficient to contravene a "comprehensive network of statutory and regulatory directives governing the terms of . . . employment").

In an effort to salvage their due process claims, plaintiffs have advanced some creative, although unavailing, arguments. Plaintiffs first dissect a provision of the Law of Autonomous Municipalities which defendants cited in support of their contention that the terms of the appointments could not exceed the availability of funds provided in the contract, *21 L.P.R.A. § 4554(c)*, claiming that it does not stand for what

defendants propose. But, just as the plaintiffs, we fail to see the particular applicability of said section to the facts of this case and that is precisely why we did not discuss it in reaching our conclusion. Next, plaintiffs suggest that, as a Law 52 grant "merely provides a monetary incentive for defraying municipal employees' costs, it does not impede the municipality from bestowing additional benefits upon such positions at the municipality's expense," (Plaintiffs' Memorandum of Law, docket entry 175, at pp. 4-5). Although plaintiffs imply that, in this instance, such additional benefits could have included the extension of their appointments with municipal funds beyond the expiration of the Law 52 contract, the fact remains that the former Mayor in making their appointments made exclusive reference to the Law 52 grant as the source of his authority, and no evidence has been provided that municipal funds were ever budgeted by him to fully fund their positions for another six-month term once the Law 52 grant expired on December 31, 2000. Finally, plaintiffs accuse defendants of being "budget illiterates" for proposing that a failure to meet budgetary income expectations is a source of contractual nullity. While this most certainly is not the norm, it is neither the rule that the creation of positions be made dependent on particular funds obtained by a municipality, as happened here. We, as the defendants, remain convinced that if posts are created by a municipality with an allotment of funds which has been precisely earmarked to defray their cost, and the contractual provisions governing those funds distinctly provide that they must be maintained separate from any other municipal funds and that the monies not

used for the stated purposes must be returned, the depletion of those funds necessarily results in the elimination of the positions.

In sum, inasmuch as when plaintiffs were terminated in January 2001 they no longer had any property interest in their positions, no deprivation of constitutionally protected property occurred requiring that they be afforded with due process of law, as plaintiffs had pleaded. Accordingly, all claims based on the violation of plaintiffs' due process rights are ORDERED DISMISSED.[2]

With regard to the *First Amendment* claim brought against defendant Pena, defendants contend that there is simply no evidence showing her personal involvement in the decisions to terminate the plaintiffs in January and not recall them in February 2001. Defendants aver that, at most, the evidence shows her carrying out the ministerial duty of handing to each of the plaintiffs termination letters signed by the co-defendant Mayor. Although the testimony of the majority of the plaintiffs confirms defendants' portrayal of Pena's role, plaintiff William Rosa-Figueroa testified that during the first week of February 2001 he met with Pena to apprise her of his personal situation and dire need for a municipal job, and Pena then told him that while there were certain indispensable jobs in Aguada and those people would

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2. Consequently, plaintiffs cannot argue before the jury that they had a protected property interest beyond December 31, 2000.

be reappointed, he had to understand that she had to leave some space for people of her own party. Given these statements, and Pena's key position as Human Resources Director which can be fairly inferred as giving her input on the personnel decisions taken by the Mayor, we do not believe that a reasonable person would be forced to conclude that Pena had nothing to do with the terminations and non-renewal of plaintiffs' appointments, as suggested by defendants. Thus, plaintiffs' claims under the *First Amendment* against defendant Pena pass the *Rule 50* muster and must be adjudicated by the jury.

Finally, we reach defendants' claims of qualified immunity. "Qualified immunity shields government officials performing discretionary functions from civil liability for money damages when their conduct does not violate 'clearly established' statutory authority or constitutional rights of which a reasonable person would have known." *Nereida-Gonzalez v. Tirado-Delgado, 990 F.2d 701, 704 (1st Cir.1993)*... In support of their request for immunity on plaintiffs' *First Amendment* claims for damages, defendants aver that "it is ... unclear whether [plaintiffs] have a right to be recall (sic) *ad infinitum* with Law 52 funds (or with general funds as they contended during oral arguments of the *Rule 50* motion)." *See* Defendants' Motion for Judgment as a Matter of Law, docket entry 176, p. 20 (emphasis in original). The Supreme Court reiterated in *Branti v. Finkel, 445 U.S. 507, 512 n.6, 100 S. Ct. 1287, 1291 n.6, 63 L. Ed. 2d 574*, however, that "after *Elrod [v. Burns, 427 U.S. 347, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976)]*, it

is clear that the lack of a reasonable expectation of continued employment is not sufficient to justify a dismissal based solely on an employee's private political beliefs." The Court of Appeals held in *Cheveras-Pacheco v. Rivera-Gonzalez, 809 F.2d 125 (1st Cir. 1987)*, that the *Elrod-Branti* doctrine applies to a local government's decision whether to renew the contract of a transitory employee, and later clarified in *Figueroa v. Aponte-Roque, 864 F.2d 947, 951 (1st Cir. 1989)* that this is true regardless of whether the employees have been renewed on a regular basis prior to their dismissal or have served only one term. Hence, we think it evident that it was clearly established at least since 1989, and certainly by the time plaintiffs were discharged in 2001, that a municipality may not base a decision not to renew transitory employees' contracts only on the emloyees' political affiliation, and that a Mayor and a Director of Human Resources of a Puerto Rico municipality should have known it. Defendants, therefore, are not entitled to the protection of qualified immunity on the *First Amendment* claims.

For the reasons stated above, defendants' Motion for Judgment as a Matter of Law under *Fed.R.Civ.P. 50* is GRANTED as to the due process claims and DENIED in all other respects. Accordingly, partial judgment will be entered DISMISSING, with prejudice, plaintiffs' due process claims against defendants Miguel Ruiz-Hernandez and Glenda Pena.

SO ORDERED.

At San Juan, Puerto Rico, on June 12, 2003.

CARMEN CONSUELO CEREZO

United States District Judge

PARTIAL JUDGMENT

For the reasons stated in our Order of this same date, plaintiffs' due process claims against co-defendants Miguel Ruiz-Hernandez and Glenda Pena are DISMISSED.

SO ORDERED AND ADJUDGED.

At San Juan, Puerto Rico, on June 12, 2003.

CARMEN CONSUELO CEREZO

United States District Judge

APPENDIX F — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT ENTERED JULY 7, 2010

No. 08-1989

MARITZA ACEVEDO-ORAMA, ET AL

Plaintiffs-Appellees

EILEEN B. SANCHEZ-FELICIANO, ET AL

Plaintiffs

v.

MIGUEL A. RUIZ-HERNANDEZ, in his official capacity as Mayor of the Municipality of Aguada and in his personal capacity, ET AL

Defendants/Third Party Plaintiffs-Appellants

MUNICIPALITY OF AGUADA, PUERTO RICO

Defendant-Appellant

ANIBAL MENDOZA, in his official capacity as the Municipality of Aguada's Public Works Director and in his personal capacity

Defendant/Third Party Plaintiff

JULIO CESAR ROMAN, Former Mayor of Aguada

Third Party Defendant

Appendix F

Before

Lynch, *Chief Judge*, Torruella, Boudin, Lipez, Howard and Thompson, *Circuit Judges*.

ORDER OF COURT

Entered: July 7, 2010

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be *denied*.

By the Court:

/s/ Margaret Carter, Clerk